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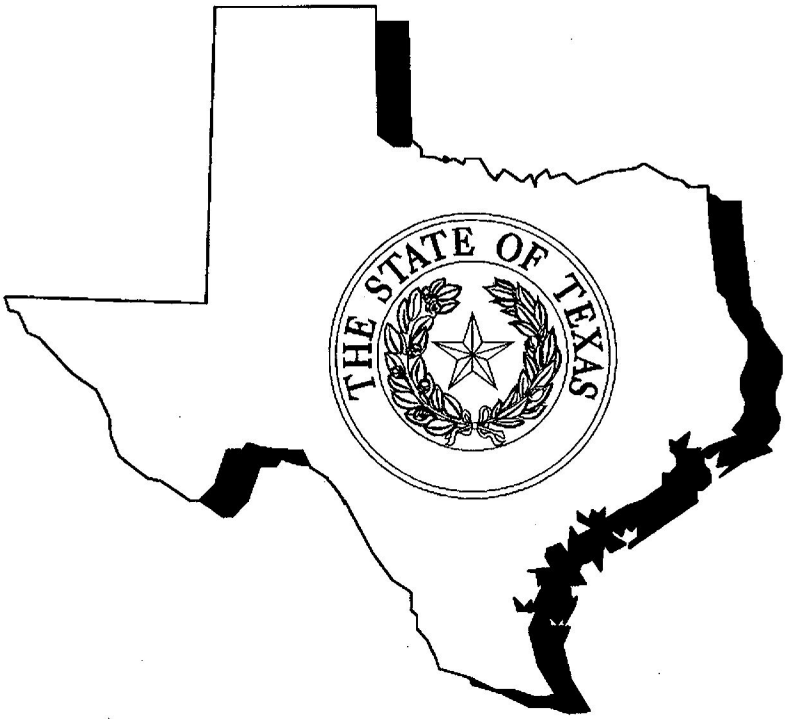
APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**



DIRECT TESTIMONY OF RUTH STARK

RATE REGULATION DIVISION

PUBLIC UTILITY COMMISSION OF TEXAS

NOVEMBER 2, 2022

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ATTACHMENTS

I. QUALIFICATIONS

Q. Please state your name and business address.

A. Ruth Stark, 1701 North Congress Avenue, Austin, Texas 78711.

Q. By whom are you employed and in what capacity?

A. I am employed by the Public Utility Commission of Texas (Commission) as a Senior Regulatory Accountant in the Rate Regulation Division.

Q. What are your principal responsibilities?

A. My responsibilities include testifying as a witness on accounting matters in rate cases and other proceedings at the Commission and participating in the overall examination, review, and analysis of rate change and other applications.

Q. Please briefly state your educational background and professional experience.

A. I received a Bachelor of Business Administration degree with a major in Accounting from the University of Texas at Austin in 1983. I am a Certified Public Accountant licensed in the State of Texas. I have accounting experience in public practice, industry, and state government. My public accounting responsibilities included tax and financial services to individuals, private enterprises, and non-profit organizations. As the accountant for a multi-divisional construction, engineering, and surveying company, I oversaw all accounting functions from maintaining the general ledger through financial statement and tax return preparation. At the Texas Water Development Board, I performed administrative duties associated with a federal construction grant program and state revolving loan fund related to municipal capital improvement projects. Except for the three-month period encompassing October through December of 2015, I have been employed with the Commission since September of 1990. Prior to my retirement in

September of 2015, I held the position of Director of Financial Review in the Rate Regulation Division for 16 years.

Q. Have you previously testified before the Commission?

A. Yes. Attachment RS-1 presents a summary of the dockets in which I have testified.

II. PURPOSE OF TESTIMONY

Q. What is the purpose of your testimony in this proceeding?

A. The purpose of my testimony is to provide Staff's recommendation regarding the reasonableness of the rate-case expenses requested by Entergy Texas, Inc. (ETI) and Cities Served by Entergy Texas, Inc. (Cities)[1] for this rate case and its last fuel reconciliation proceeding, Docket No. 49916.[2]

Q. What is the basis of your recommendation?

A. My recommendation is based on my review and analysis of the information filed in this proceeding by ETI and Cities. This includes ETI's application and associated testimony; errata; supplemental testimony; responses to requests for information (RFIs), including updates thereto; and the direct testimony of Cities.

Q. Do any other Staff witnesses address rate-case expenses?

A. Yes. Staff witness Emily Sears addresses the use of ETI's over-recovery of hurricane restoration costs to offset the total amount of rate-case expenses to be recovered.

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[1] The Cities of Anahuac, Beaumont, Bridge City, Cleveland, Dayton, Groves, Houston, Huntsville, Liberty, Montgomery, Navasota, Nederland, Oak Ridge North, Orange, Pine Forest, Pinehurst, Port Arthur, Port Neches, Roman Forest, Rose City, Shenandoah, Silsbee, Sour Lake, Splendora, Vidor, West Orange, and Willis.

[2] *Application of Entergy, Texas, Inc. for Approval to Reconcile Fuel and Purchased Power Costs,* Docket No. 49916, Order (Aug. 27, 2020).

Q. What is the statutory basis for the recovery of rate-case expenses incurred by regulated electric utilities like ETI and municipal intervenors?

A. The statutory basis for the recovery of rate-case expenses incurred by a regulated utility is set forth in the Public Utility Regulatory Act, Tex. Util. Code Ann. (PURA) § 36.061. There is also a statutory foundation for the recovery of the expenses of municipalities incurred for participating in ratemaking proceedings before the Commission. This basis is presented in PURA § 33.023.

Q. What standards apply in the determination of the reasonableness of the requested rate-case expenses?

A. I have applied the standards of 16 Texas Administrative Code (TAC) § 25.245(b) of the Commission's substantive rule related to recovery of rate-case expenses, which states:

> (b) **Requirements for claiming recovery of or reimbursement for rate-case expenses**. A utility or municipality requesting recovery of or reimbursement for its rate-case expenses shall have the burden to prove the reasonableness of such rate-case expenses by a preponderance of the evidence. A utility or municipality seeking recovery of or reimbursement for rate-case expenses shall file sufficient information that details and itemizes all rate-case expenses, including, but not limited to, evidence verified by testimony or affidavit, showing:
>
> (1) the nature, extent, and difficulty of the work done by the attorney or other professional in the rate case;
> (2) the time and labor required and expended by the attorney or other professional;
> (3) the fees or other consideration paid to the attorney or other professional for the services rendered;
> (4) the expenses incurred for lodging, meals and beverages, transportation, or other services or materials;
> (5) the nature and scope of the rate case, including:
> (A) the size of the utility and number and type of consumers served;
> (B) the amount of money or value of property or interest at stake;
> (C) the novelty or complexity of the issues addressed;
> (D) the amount and complexity of discovery;

(E) the occurrence and length of a hearing; and

(6) the specific issue or issues in the rate case and the amount of rate-case expenses reasonably associated with each issue.

I have also applied the standards of 16 TAC § 25.245(c) which states:

(c) **Criteria for review and determination of reasonableness**. In determining the reasonableness of the rate-case expenses, the presiding officer shall consider the relevant factors listed in subsection (b) of this section and any other factor shown to be relevant to the specific case. The presiding officer shall decide whether and the extent to which the evidence shows that:

(1) the fees paid to, tasks performed by, or time spent on a task by an attorney or other professional were extreme or excessive;

2) the expenses incurred for lodging, meals and beverages, transportation, or other services or materials were extreme or excessive;

(3) there was duplication of services or testimony;

(4) the utility's or municipality's proposal on an issue in the rate case had no reasonable basis in law, policy, or fact and was not warranted by any reasonable argument for the extension, modification, or reversal of commission precedent;

(5) rate-case expenses as a whole were disproportionate, excessive, or unwarranted in relation to the nature and scope of the rate case addressed by the evidence pursuant to subsection (b)(5) of this section; or

(6) the utility or municipality failed to comply with the requirements for providing sufficient information pursuant to subsection (b) of this section.

III. SUMMARY OF REQUESTED RATE-CASE EXPENSES

Q. Please summarize ETI's rate-case expense request in this proceeding.

A. ETI's requests with respect to rate-case expenses are presented in the direct testimonies of Meghan E. Griffiths and Richard E. Lain. Ms. Griffiths presents ETI's request for its external rate-case expenses while Mr. Lain presents ETI's request for internal rate-case expenses. According to the testimony of Ms. Griffiths and Mr. Lain, ETI requests

recovery of rate-case expenses for its last fuel reconciliation proceeding, Docket No. 49916, and expenses for the instant case, Docket No. 53719.[3] ETI's request also includes its unrecovered rate-case expense reimbursements to Cities for these proceedings.[4] As outlined in the supplemental direct testimony of Ms. Griffiths, ETI requests its actual rate-case expenses of $804,731 for Docket No. 49916 and estimates it will incur a total of $8,435,000 of rate-case expenses for Docket No. 53719.[5]

Q. What are the components of ETI's requested actual rate-case expenses for Docket No. 49916?

A. The components of ETI's actual rate-case expenses for Docket No. 49916 are as follows:

ETI Actual Requested Expenses Docket No. 49916

EXTERNAL EXPENSES[6]	
Outside Legal Counsel:	
Duggins Wren Mann & Romero LLP	$ 169,597
Eversheds Sutherland US LLC	$ 136,143
Total External	**$ 305,740**
INTERNAL EXPENSES[7]	
Depreciation & Amort Expenses	$ 31,775
Direct Payroll	$ 6,503
Service Company Recipient	$ 44,707
Payroll Loader Allocation	$ 1,203
Benefits and Pension Allocation	$ 1,475
Employee Expenses	$ 1,501
Office and General Expenses	$ 493
ESL Payroll Benefits & Taxes	$ 359,416
Kennedy Reporting Service	$ 795
Lee Group	$ 22,050
Summerour Partners LLC	$ 1,500
Total Internal	**$ 471,417**

[3] Direct Testimony of Meghan E. Griffiths (Griffiths Direct) at 3:11-16 and Direct Testimony of Richard E. Lain (Lain Direct) at 24:19-23 (Jul. 1, 2022).

[4] Application at Schedules G-14.1, line 14 and Schedule G-14.2, line 14.

[5] Supplemental Direct Testimony of Meghan E. Griffiths (Griffiths Supplemental) at 3:7-9 (Oct. 13, 2022).

[6] Griffiths Supplemental at Exhibit MEG-SD1-1.

[7] Supplemental Direct Testimony of Richard E. Lain (Lain Supplemental) at Exhibit REL-SD1-5 at 2 (Oct. 13, 2022).

INTERVENOR EXPENSES	**$ 27,574**
TOTAL Docket No. 49916 Actual Expenses	**$ 804,731**

Q. Did Cities file testimony and documentation in support of their rate-case expenses associated with Docket Nos. 49916 and 53719?

A. Yes. Cities has the burden to prove the reasonableness of its own rate-case expenses. My recommendation with respect to Cities' expenses for these proceedings is presented later in this testimony.

Q. What are the components of ETI's requested actual rate-case expenses to date for Docket No. 53719?

A. Based on the supplemental direct testimonies of Ms. Griffiths and Mr. Lain, the total amount of actual ETI rate-case expenses that I have reviewed for this case to date is $3,263,537 through August 31, 2022, consisting of the following:

ETI Actual Requested Expenses Docket No. 53719

EXTERNAL EXPENSES[8]	
Outside Legal Counsel:	
Duggins Wren Mann & Romero LLP	$ 559,157
Eversheds Sutherland US LLC	$ 253,187
Jager Smith JR DBA Jager Smith LLC	$ 10,824
Taggart Morton LLC	$ 12,200
Consultants:	
Alliance Consulting Group	$ 51,510
The Brattle Group	$ 6,026
Expergy	$ 42,405
Jackson Walker LLP	$ 28,415
KFG, Inc.	$ 55,965
Lewis & Ellis, Inc.	$ 15,680
Osprey Energy Group	$ 3,675
ScottMadden, Inc	$ 22,570
Accounting	
Deloitte and Touche LLP	$ 150,000
Total External Expenses	**$1,211,614**
INTERNAL EXPENSES[9]	

[8] Griffiths Supplemental at Exhibit MEG-DS1-4 through Exhibit MEG-SD1-17.

Agency Booking Fees	$ 15
Airfare	$ 927
Business Meals/Entertainment	$ 147
Computer & Office Supplies	$ 743
Depreciation & Amort Expenses	$ 112,688
Empl Wrk Meal/Functions/Awards	$ 236
Lodging	$ 595
Other Employee Expenses	$ 20
Personal Car Mileage – Local	$ 0
Postage and Overnight Delivery	$ 140
Safety Training Loader	$ 0
Service Company Recipient	$ 160,883
Temporary Employee Services	$ 6,588
Transportation	$ 0
Travel Transportation	$ 246
Advertising Expenses	$ 121,355
ESL Payroll Benefits & Taxes	$1,647,342
Total Internal Expenses	**$2,051,923**
TOTAL Docket No. 53719 Expenses through 8/31/22	**$3,263,537**

Q. How will ETI's and Cities' remaining rate-case expenses for this case be addressed?

A. Both Ms. Griffiths and Mr. Lain state that they expect to file further supplemental testimony or affidavits at a later date to address the additional expenses ETI incurs for this proceeding. Ms. Griffiths noted that she anticipates ETI will update its rate-case expenses at or after the conclusion of the hearing on the merits.[10] Cities' rate-case expenses are supported by the testimony of Mr. Norman J. Gordon,[11] who indicates he will supplement his testimony as appropriate should the Cities' attorneys or consultants submit additional invoices prior to the time of the hearing.[12]

[9] Lain Supplemental at Exhibit REL-SD1-5 at 1.

[10] Griffiths Supplemental at 4:12-17.

[11] Direct Testimony of Norman J. Gordon on Behalf of Cities Served by Entergy Texas (Gordon Direct) at 9 (Oct. 26, 2022).

[12] Gordon Direct at 9:17-19.

IV. REVIEW AND RECOMMENDATION

Q. Please explain your review of the requested rate-case expenses.

A. I performed a review to determine if the requested rate-case expenses meet the requirements of PURA and 16 TAC § 25.245. I reviewed the testimonies of Mr. Lain and Ms. Griffiths on behalf of ETI as well as the testimony of Mr. Gordon provided on behalf of Cities. I also reviewed supporting documentation, including itemized rate-case expense invoices related to this proceeding and Docket No. 49916. My review of the detailed billings included: the detailed descriptions of the work performed by attorneys and consultants to the extent they were not redacted, the number of hours billed for each activity for each day, the individual hourly billing rates charged, and expense items like copies, delivery charges, and travel expenses. Additionally, I reviewed the computation of the total fee billed for accuracy and determined that the work performed was within the scope of what would be expected in the relevant type of proceeding. I also reviewed ETI's requested internal rate-case expenses for reasonableness. Finally, I reviewed the terms of the order in Docket No. 49916 to ascertain if ETI's request complies with the terms of the order approved by the Commission in that proceeding.

Q. Based on your review, did you identify any issues with respect to ETI's requested rate-case expenses?

A. Yes, I identified several issues with respect to both the external and internal rate-case expenses requested by ETI and will address each of my proposed disallowances related to those issues separately below.

A. EXTERNAL RATE-CASE EXPENSES

Q. Please discuss the issues you found in your review of ETI's requested external rate-case expenses.

A. I identified three issues with respect to ETI's requested external rate-case expenses for non-compliance with 16 TAC § 25.245(c), specifically the first criterion set out in this section of the rule, which is:

> (1) the extent to which the evidence shows that the fees paid to, tasks performed by, or time spent on a task by an attorney or other professional were extreme or excessive.

1. ETI's Excess Legal Hourly Billing Rates

Q. Please explain your first issue regarding non-compliance with 16 TAC § 25.245(c)(1).

A. My first issue is associated with ETI's requested legal expenses for both Docket Nos. 49916 and 53719 for attorney hourly billing rates in excess of $550 per hour. My proposed disallowance for excess hourly rates relates to the hourly billing rate of a single attorney at the Eversheds Sutherland US LLP (Eversheds) firm for work on both cases and the hourly billing rates of two attorneys from the Jackson Walker LP (Jackson Walker) firm for work in this proceeding.

Q. What is the basis of your recommendation?

A. My recommendation is based on the Commission's adoption of the Proposal for Decision (PFD) in Southwestern Electric Power Company's (SWEPCO) recent rate case, Docket No. 51415,[13] that found, among other things, that "[t]he $550 cap recommended in this case is a reasonable cap for the highest fees charged by **the most experienced attorneys** participating in a complex base rate case."[14] Staff began recommending a $550 cap on hourly attorney fees in 2013 based on a 2012 Office of the Attorney General of Texas (OAG) memorandum to state agencies, university systems, and institutions of higher

[13] *Application of Southwestern Electric Power Company for Authority to Change Rates,* Docket No. 51415, Order (Jan. 14, 2022)

[14] Docket No. 51415, Proposal for Decision (PFD) at 332 (Aug. 27, 2021) (emphasis added).

education outlining policies and procedures relating to the retention of outside legal counsel.[15] This memorandum stated that unless expressly approved, the hourly rate for attorneys shall not exceed $525 per hour.[16] At that time, Staff was looking for an objective (as opposed to subjective) measurement of the reasonableness of hourly attorney rates and adopted the cap set by the OAG rounded to the nearest $50. Staff's reasoning for relying upon the OAG memorandum was that if an entity of the size and complexity of the State of Texas could conduct its legal affairs based on this rate, the entities regulated by the state should also be able to conduct their legal affairs based on that rate.

The OAG issued subsequent memoranda in 2014, 2016, and 2019 that amended and superseded the original guidelines, but retained the limit on hourly rates for attorneys at $525 per hour.[17] The $525 per hour limitation has been in place for ten years. Given that the OAG amended certain aspects of its directives in the 2014, 2016, and 2019 updates, but has left this hourly fee limitation unchanged to the present date, the Attorney General has determined that $525 per hour is still the reasonable allowable rate for legal services provided on behalf of the taxpayers of the State of Texas.

The State of Texas is a large, multifaceted entity that requires the services of attorneys on a multitude of complicated legal issues, including electric utility rate cases. Although the OAG memoranda provide a process for state agencies to hire outside counsel for complex legal issues, to my knowledge, the State does not do so for electric

[15] Memorandum from Office of the Attorney General to State Agencies, University Systems, and Institutions of Higher Education (Apr. 2, 2012). *See* Attachment RS-2.

[16] *Id.* at 3.

[17] Memorandum from Office of the Attorney General to State Agencies, University Systems, Institutions of Higher Education Re: Updates – Outside Counsel Rules and Templates (June 2014), Memorandum from Office of the Attorney General to State Agencies, University Systems, Institutions of Higher Education Re: Outside Counsel Contract Rules and Templates (Dec. 9, 2016) and Memorandum from Office of the Attorney General to State Agencies, University Systems, Institutions of Higher Education and Prospective Outside Counsel Re: Outside Counsel Contract Rules and Templates (July 3, 2019). *See* Attachment RS-3.

utility rate cases. Attorneys in the Commission's Legal Division lead the presentation of Staff's cases representing the public interest in complex electric rate cases, attorneys in the Commission's Office of Policy and Docket Management are responsible for advising the Commissioners in complex electric rate cases, and attorneys employed by the Office of the Attorney General represent the Commission in appeals of its orders in complex electric rate cases. Additionally, attorneys employed by the Office of Public Utility Counsel represent residential and small commercial ratepayers in complex electric rate cases. Therefore, the rules for the State of Texas' outside legal representation, capping fees at $525 an hour, provide an objective benchmark for determining the reasonableness of the legal rate-case expenses of regulated utilities and municipalities in the state with respect to electric rate cases.

Q. Should the hourly rate cap be adjusted for inflation over time?

A. The PFD in Docket No. 51415 was issued on August 27, 2021. At that time the ALJs determined that the $550 per-hour cap was reasonable: "Today, however, and particularly in light of the OAG's 2016 and 2019 memoranda on the topic, $550 is the upper limit."[18] The ALJs acknowledged that "…at some point in the future, hourly rates in excess of $550 per hour may not be deemed excessive, and instead might be deemed reasonable, depending on the then-existing circumstances, such as the economy, inflation, or any other number of factors."[19] The Commission's order in that case, issued almost five months later on January 14, 2022, adopted the PFD and found the $550 cap was still appropriate at that time.[20] To the best of my knowledge, as of the date this testimony was drafted, the OAG has not issued any subsequent guidance that would adjust its hourly cap

[18] Docket No. 51415 PFD at 330.

[19] *Id.*

[20] Docket No. 51415, Order at Finding of Fact No. 309: "The rates SWEPCO paid to outside attorneys in excess of $550 per hour are excessive and not reasonable."

upward. It is my position that the Commission should not make an inflation adjustment, as it would move away from an objective measure of the reasonableness of attorney hourly rates (the most recent rate allowed by the OAG) towards one that is more subjective.

Q. You explained that your hourly rate adjustment is based on the Commission's recent disallowance of legal expenses above $550 per hour in Docket No. 51415. Will you please provide a discussion of that ruling?

A. Yes. As I noted above, the Commission disallowed legal rate-case expenses in excess of $550 per hour in SWEPCO's last rate case, Docket No. 51415. The PFD adopted by the Commission in that case explained the issue in detail as follows:

> The ALJs find that Staff's proposed $550 per-hour cap on hourly rates sought for recovery as RCEs in this case is reasonable and supported by the record in this case. The ALJs, however, are not recommending that a hard $550 per-hour cap should apply in all future cases for two primary reasons. First, at some point in the future, hourly rates in excess of $550 per hour may not be deemed excessive, and instead might be deemed reasonable, depending on the then-existing circumstances, such as the economy, inflation, or any other number of factors. Today, however, and particularly in light of the OAG's 2016 and 2019 memoranda on this topic, $550 is the upper limit. Second, there may be instances in the near term, not present here, where an electric utility could justify a request to recover in excess of $550 per hour from its customers.[21]
>
> In this case, SWEPCO has not met its burden of proof to show the reasonableness of RCEs in excess of $550 per hour. The RCE Rule requires SWEPCO to file sufficient information that details and itemizes all rate-case expenses. SWEPCO did not provide sufficient information in its direct or rebuttal case explaining or justifying why it would be reasonable for SWEPCO's customers to reimburse SWEPCO for legal counsel rates in excess of $550. As Staff noted, this $550 per hour cap issue is not novel to this rate case, and SWEPCO could have anticipated that this issue would be contested. Staff, however, presented a compelling case that legal fees in excess of $550 per hour in this rate case are

[21] *Application of Southwestern Electric Power Company for Authority to Change Rates,* Docket No. 51415, Proposal for Decision at 330 (Aug. 27, 2021).

> excessive and, therefore, unreasonable and should not be borne by the [sic] SWEPCO's customers.[22]
>
> The reference to "self-funded litigants" in the preamble to the RCE Rule is there to "incentivize" utilities and municipalities to act with some restraint when incurring RCEs—as would self-funded litigants who do not recover their legal expenses from their captive customers. A true self-funded litigant relies on its shareholders or association members to pay, or cover, its legal fees, not its customers. SWEPCO argues that it is nevertheless "acting" like a self-funded litigant because self-funded litigants routinely hire Mr. Seltzer and Justice Phillips at the same rates those two attorneys charged to SWEPCO. Essentially, SWEPCO argues that if some person or company is willing to hire Mr. Seltzer and Justice Phillips in excess of $550 per hour (in these cases, in excess of $1000 per hour), then SWEPCO's customers should be expected to also cover RCEs in excess of $550 per hour. The evidence shows that Mr. Seltzer and Justice Phillips bill out at hourly rates in excess of $1000 per hour. SWEPCO, however, has pointed to nothing in the RCE Rule that suggests that if a consultant or lawyer hired by a utility or municipality routinely bills at a rate in excess of $550 per hour to non-utility clients, then that rate is essentially, *de facto* reasonable in the context of utility rate case RCEs.[23]
>
> As addressed in the Docket No. 45979 PFD, the ALJs have some reservations about recommending a $550 per hour cap for attorneys' fees in this case because this recommendation could lead some lawyers providing services in ratemaking proceedings to assume they can increase their hourly rates to $550. That is not the intent of this recommendation. The $550 cap recommended in this case is a reasonable cap for the highest fees charged by the most experienced attorneys participating in a complex base rate case. SWEPCO and CARD can agree to pay more than $550 per hour to their outside counsel and consultants, but they should not expect to be compensated for charges in excess of that amount without a compelling showing that the payment is reasonable and not excessive. In any event, they must justify all of their requested RCEs regardless of hourly rate,[24]

Additionally, in adopting this PFD, the Commission's Order in Docket No. 51415 included the following findings:[25]

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[22] *Id.* at 330-331.

[23] *Id.* at 331-332.

[24] *Id.*at 332.

[25] Docket No. 51415, Order at Finding of Facts Nos. 306-311.

306. The Office of the Attorney General issued a memorandum in 2016 that limited the maximum outside counsel per-hour fee to $525 but allowed the Deputy Attorney General to authorize a higher fee. This memorandum was addressed to, among others, state agencies and addressed "Outside Counsel Contract Rules and Template."

307. The Office of Attorney General issued a follow-up memorandum in 2019 that did not increase the $525 per hour fee cap. The follow-up memorandum also was directed to state agencies and addressed Outside Counsel Contract Rules and Templates.

308. SWEPCO did not meet its burden of proof to show that the nature, extent, and difficulty of the work performed by the attorneys who charged in excess of $550 per hour justified hourly rates in excess of $550 in this base-rate case.

309. The rates SWEPCO paid to outside attorneys in excess of $550 per hour are excessive and not reasonable.

310. The fact that other entities may be willing to pay an attorney a rate in excess of $550 per hour does not mean that the rate is reasonable and not excessive in the context of a Commission electric utility rate proceeding.

311. SWEPCO's request to recover $65,167 in rate-case expenses related to outside attorney fees billed in excess of $550 per hour should be denied.

Q. The Docket No. 51415 PFD, quoted above, cites to the PFD in Docket No. 45979.[26] Did the Docket No. 45979 PFD provide further explanation of the attorney hourly rate issue?

A. Yes. Although the Commission ultimately dismissed the proceeding in Docket No. 45979, the PFD in that case is still instructive:

> The ALJ agrees with Staff and OPUC that, in general, a cap on hourly fees charged by attorneys in utility rate cases before the Commission is appropriate and, in this case, the record supports a $550 per hour cap . . . While Rule 25.245(c)(1) does not specify a cap on attorneys' fees, it contemplates that fees paid to an attorney or other professional could be "extreme or excessive." Otherwise, there would be no purpose for Rule

[26] *Review of Rate Case Expenses Incurred by Sharyland Utilities, L.P. in Docket No.* 45414, Docket No. 45979, Order of Dismissal (Aug. 8, 2019).

> 25.245 to identify the level of fees paid to an attorney (or other professional) as a consideration under that rule.[27]

The Commission's order adopting 16 TAC § 25.245 notes that "adopting clear evidentiary standards and specific criteria for the review and determination of the reasonableness of rate-case expenses will incentivize utilities and municipalities to act more like self-funded litigants, while still providing for recovery of reasonable rate-case expenses."[28] The ALJs in Docket No. 45979 acknowledged this, finding that:

> Setting attorneys' fees in an RCE case based on the upper end of hourly rates charged by large, national law firms would remove the intended incentive for regulated public utilities to act more like self-funded litigants . . . National law firms may charge $600 and more per hour, and Sharyland is free to hire such firms to represent it before the PUC, but that does not mean that rates in that range are reasonable for practitioners before the PUC, and Sharyland's captive customers should not be expected to cover hourly fees at and above $550 per hour.[29]

Q. Did ETI address the Commission's disallowance of legal rate-case expenses in excess of $550 per hour in Docket No. 51415?

A. Yes. ETI witness Ms. Griffiths acknowledged the Commission's disallowance of legal expenses in excess of $550 per hour in Docket No. 51415, stating that they were disallowed because the utility failed to meet its burden of proof to show that the nature, extent, and difficulty of the work performed by the attorneys in question justified hourly rates in excess of $550.[30]

Q. How did Ms. Griffiths otherwise address the reasonableness of the rates charged by Eversheds and Jackson Walker?

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[27] Docket No. 45979, Proposal for Decision at 41-42 (Oct. 26, 2018).

[28] *Rulemaking to Propose New SUBST. R. § 25.245, Relating to Recovery of Expenses for Ratemaking Proceedings,* Project No. 41622, Order Adopting New § 25.245 as Approved at the July 10, 2014 Open Meeting (Order) at 13-14 (Aug. 6, 2014).

[29] Docket No. 45979, Proposal for Decision at 42–43.

[30] Griffiths Direct at 25:5-11.

A. Ms. Griffiths asserted that she compared Eversheds' current rates to those charged in ETI's prior rate case and to rates charged by other attorneys providing similar services for Texas rate cases, citing to Docket No. 53601,[31] Oncor Electric Delivery Company LLC's (Oncor) pending rate case, Docket No. 43950,[32] a 2014 Cross Texas Transmission LLC (Cross Texas) rate case, and Oncor's 2017 rate case, Docket No. 46957.[33] Ms. Griffiths cited these three proceedings as examples of cases where, according to her, attorney billing rates were above those Eversheds and Jackson Walker are charging ETI in this case, and asserted that they were supported by testimony as reasonable.[34]

Q. How do you respond to Ms. Griffith's implication that Eversheds' and Jackson Walker's rates are reasonable because they are comparable to those charged to utilities in certain other Texas rate cases?

A. I would point out the fact that just because Texas utilities may have been charged and paid legal rates that were higher than those charged by Eversheds and Jackson Walker in this proceeding does not mean that those rates were approved for recovery from ratepayers by the Commission. For example, the rate-case expenses for Docket No. 43950 cited by Ms. Griffiths were severed into a separate proceeding, Docket No. 44546, where the parties reached a settlement that reduced Cross Texas' requested rate-case expenses of $1,793,990 down to $1,762,608.[35] There is no evidence in the order or settlement agreement regarding the actual amount of rate-case expenses versus the settled

[31] *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 53601, Pending (May 13, 2022).

[32] *Application of Cross Texas Transmission, LLC for Authority to Change Rates,* Docket No. 43950, Order (May 1, 2015).

[33] *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 46957, Order (Oct. 13, 2017).

[34] Griffiths Direct at 24:13 – 25:5.

[35] *Application of Cross Texas Transmission, LLC for Rate Case Expenses Severed from PUC Docket No. 43950,* Docket No. 44546, Stipulation and Settlement Agreement Regarding Rate Case Expenses at 1-2 (Dec. 11, 2015).

and Commission-approved amount of $3,896,420 for Oncor's rate-case expenses in Docket No. 46957, while the attorney hourly rates in Oncor's pending Docket No. 53601 have been strongly contested by Staff through my own testimony[36] and have not been approved for recovery by the Commission.

Q. Did Oncor provide a similar comparison of its legal hourly rates in Docket No. 53601 with the attorney hourly rates in other Commission proceedings?

A. Yes, Oncor provided a similar comparison. Oncor explained that it compared the hourly rates to those billed in other recent cases for CenterPoint Energy Houston Electric, LLC (CenterPoint), AEP Texas, Inc. (AEP), and Southwestern Public Service Company (SPS).[37] My direct testimony in Docket No. 53601 pointed out that in the most recent rate cases of both CenterPoint and AEP, the companies agreed to forego recovery of any rate-case expenses for those proceedings, and SPS agreed to a reduction of $300,000 to its requested rate-case expenses in its last rate case.[38]

Q. Have other Texas utilities recently presented rate cases where the attorney hourly billing rates were less than $550 per hour?

A. Yes. In SWEPCO's Docket No. 51415, cited and discussed previously, with the exception of the few disputed hours in that case, the vast majority of the attorney hours were billed at rates below $550 per hour, and in Docket No. 52195[39] of El Paso Electric Company, all requested legal fees were billed at rates less than $550 per hour.

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[36] Docket No. 53601, Direct Testimony of Ruth Stark at 14-26 (Aug. 2, 2022).

[37] Docket No. 53601, Direct Testimony of Robert A Schmidt at 10:6-9 (May 13, 2022).

[38] *Application of CenterPoint Energy Houston Electric, LLC for Authority to Change Rates*, Docket No. 49421, Order at Finding of Fact No. 101 (Mar 9, 2020), *Application of AEP Texas Inc. for Authority to Change Rates*, Docket No. 49494, Order at Finding of Fact No. 142 (Apr. 3, 2020), and *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 51802, Order at Findings of Fact Nos. 93 and 94 (May 20, 2022).

[39] *Application of El Paso Electric Company to Change Rates*, Docket No. 52195, Order (Sep. 15, 2022).

Q Does your recommendation imply that ETI cannot pay more than $550 per hour to its outside legal counsel?

A. No. My recommendation does not prohibit ETI from paying higher rates for legal counsel. My recommendation is only intended to be a cap on the amount that should reasonably be recovered from ETI's ratepayers.

Q. What is your recommended adjustment for ETI's attorney billings in excess of $550 per hour?

A. My proposed adjustment for attorney hourly billing rates in excess of $550 per hour is based on ETI's initial and supplemental responses to Staff's First Request for Information, Question No. Staff 1-2, where the Company identified billings in excess of $550 per hour.[40] To avoid duplicative adjustments, I excluded all billings for which the hourly rate was in excess of $550 per hour for time entries that were also redacted. These billings are included in my adjustment related to redacted invoices as discussed in the following section. This results in a recommended disallowance for legal hourly billing rates in excess of $550 per hour for each of the two proceedings as follows:[41]

Disallowed ETI Legal Billings in Excess of $550 Per Hour

Docket Number	Disallowance for Hourly Billing Rate > $550
49916	$ 672
53719	$ 14,196
TOTAL	$ 14,868

The proposed disallowance of $14,868 is the product of multiplying the applicable number of hours billed by the portion of the associated hourly billing rate that is above $550.

[40] *See* Attachment RS-4.

[41] *See* Attachment RS-5

2. ETI's Redacted Invoices

Q. Please discuss the next issue you found in your review.

A. The next issue I noted is also related to the criteria outlined in 16 TAC § 25.245(c)(1). With respect to the legal invoices submitted by ETI for both Docket Nos. 53719 and 49916, ETI submitted invoices for which some descriptions of the tasks performed were either partially or totally redacted. It is impossible to determine if the tasks performed by or time spent on a task by an attorney or other professional were extreme or excessive when the descriptions of the tasks performed and the matters to which the tasks pertain are redacted. Additionally, there is no way to determine that there are no prohibited activities included in the redacted billings (such as legislative advocacy).

Q. Do redacted invoices meet the evidence requirements of 16 TAC § 25.245?

A. It is my opinion that they do not meet the evidence standards of 16 TAC § 25.245. ETI has the burden of proving that its requested rate-case expenses are reasonable and it is legally entitled to redact the invoices of its attorneys. However, the Commission has the statutory authority to disallow expenses for which ETI has failed to meet its burden to prove their reasonableness. For each of the redacted time entries, I cannot recommend to the Commission that the tasks performed, or time spent on tasks are reasonable, nor can I recommend that they are unreasonable. I do not have access to the information necessary to make that determination and neither does the Commission. The only parties with access to the information necessary to make a recommendation with respect to reasonableness of the tasks performed or the time spent on a task are ETI and its paid consultant. This is directly at odds with the Commission's stated purpose in adopting its rule on rate-case expenses. At the July 19, 2013 open meeting, while discussing the newly opened Project No. 41622 for development and adoption of the current rate-case expense rule, the Commission commented on the pending rulemaking as follows:

> ". . . we have a rulemaking open to -- you know, for us – for the Commission to start scrubbing attorney's fees."[42]
>
> ". . . I want us as a Commission to set up a more robust process for reviewing those attorney's fees that are submitted in rate cases, because I think it's incumbent upon us to do that."[43]
>
> ". . . This is my word of caution to all those who bring attorney's fees before us, and that includes everybody, and that is, we are fixing to start a new dawn here when it comes to that, and we're going to be looking at those attorney's fees for reasonableness, because it's apparent to me that when these cases come to us there's always a settlement and one party is getting attorney's fees and the other party is getting attorney's fees and so no one is really scrutinizing what those are . . ."[44]
>
> ". . . the gravy train – you know, we are at the end of the road, you know, of the gravy train and going forward, folks, you need to really prove it up with real evidence . . ."[45]

Submitting rate-case legal invoices for review that are redacted forces a less transparent review of the requested legal expenses which directly conflicts with the Commission's stated goal of a more robust review of attorney fees. Additionally, in response to a proposal in the 16 TAC § 25.245 rulemaking project that the rule explicitly authorize the redaction of attorney and consultant invoices, the Commission declined to do so, noting that "any party may request the entry of a protective order and that, to the extent that the invoices in question contain confidential information, parties may assert that documents are subject to a claim of confidentiality pursuant to the commission's rules."[46] These declarations by the Commission make clear its intent in adopting 16 TAC § 25.245 was that ratepayers should only be required to pay for rate-case expenses that are able to be fully scrutinized ("scrubbed") and for which compliance with the rule can be confirmed.

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[42] Open Meeting Tr. at 70:18-20 (July 19, 2013).

[43] *Id.* at 70:25 – 71:4.

[44] *Id.* at 75:9-18.

[45] *Id.* at 76:21-24.

[46] Project No. 41622, Order at 73-74.

Q. What is your recommendation with respect to the redacted legal invoices?

A. For the legal rate-case expenses associated with this rate case and Docket No. 49916, I recommend disallowance of the entire amount of each time entry in which any portion of the description of the task performed or the matter it pertains to is redacted. With respect to time entries that are partially redacted, ETI has the burden of proof in this proceeding, and neither I nor the Commission can ascertain what portion of such time entry was related to the redacted activity when multiple tasks appear in a single entry.

Q. How did you quantify the amount of your proposed adjustment related to redacted legal invoices?

A. I calculated my proposed disallowance by multiplying the actual hourly billing rate times the total time recorded for each time entry containing redaction. My total proposed adjustment for ETI's redacted invoices is $22,231, broken out among the two proceedings as follows:

Adjustment for ETI's Redacted Invoices[47]

Docket Number	Disallowance for Redacted Invoices
49916	$ 21,269
53719	$ 962
TOTAL	$ 22,231

Q. Do you have any additional comments regarding your proposed disallowance for redacted invoices?

A. Yes. In its rebuttal or supplemental rate-case expense testimony ETI may be able to provide the exact time spent on each redacted task for the time entries that contain both redacted and unredacted descriptions of work performed that could lower my recommended disallowance, but I do not have the information to do that at this time.

[47] *See* Attachment RS-6.

3. Deloitte & Touche Accounting Expenses

Q. What is your third issue related to non-compliance with 16 TAC § 25.245(c)(1)?

A. The third issue I found in my review is related to expenses for accounting services provided by the firm Deloitte & Touche LLP (Deloitte).

Q. Please explain the disallowance you recommend related to the services provided by Deloitte.

A. The single page invoice submitted by Deloitte was for a lump sum of $150,000.[48] Due to this presentation, it is not possible to determine that the fees paid to, tasks performed by, or time spent on tasks were not extreme or excessive. ETI previously submitted invoices for services provided by Deloitte that included the required evidence in a prior rate case, Docket No. 41791.[49] Additionally, based on Staff testimony for this same issue related to Deloitte invoices in Docket No. 48439,[50] the separate rate-case expense proceeding associated with its last rate case, Docket No. 48371,[51] ETI was aware of this issue of non-compliance with the Commission's adopted rate-case expense rule and should have structured its agreement with Deloitte in a manner that would require the submission of documentation that complies with the requirements of the rule. I therefore recommend a disallowance of $150,000 for this expense due to the lack of evidence required by 16 TAC § 25.245(c)(1).

[48] *See* Attachment RS-7.

[49] *Application of Entergy Texas, Inc. for Authority to Change Rates and Reconcile Fuel Costs,* Docket No. 41791, Order (May 16, 2014).

[50] *Review of the Rate Case Expenses Incurred in Docket No. 48371,* Docket No. 48439, Order (Feb. 14, 2020).

[51] *Application of Entergy Texas, Inc. Statement of Intent and Application for Authority to Change Rates,* Docket No. 48371, Order (Dec. 20, 2018).

B. INTERNAL RATE-CASE EXPENSES

Q. Please describe ETI's request for internal rate-case expenses.

A. ETI requests internal rate-case expenses that it claims are incremental expenses the Company would not have incurred absent Docket Nos. 49916 and 53719.[52] These requested internal rate-case expenses are presented by proceeding at Exhibit REL-SD1-5 to the supplemental direct testimony of Richard E. Lain and previously in this testimony at pages 5 and 6.

1. Internal Payroll, Service Company Recipient Allocation, and Depreciation Expense

Q. Based on your review of ETI's internal rate-case expenses, have you identified any issues or concerns regarding ETI's request?

A. Yes. My first issue is related to ETI's inclusion as rate-case expenses direct salaries, the salary, benefits, and associated payroll loaders of its affiliated service company, Entergy Services LLC (ESL)[53] in addition to depreciation expense and service company recipient allocations, all of which are not typically requested as rate-case expenses by other utilities.

Q. Please explain what is meant by the term "payroll loaders."

A. Payroll loaders are used to allocate payroll-related costs like payroll taxes, employee benefits, postemployment benefits, stock options, some incentive compensation, and paid time off.[54]

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[52] Lain Direct at 25:13-14.

[53] *Id.* at 25:14-18.

[54] Direct Testimony of Ryan M. Dumas at 60:16-18 (Jul. 1, 2022).

Q. What are service company recipient allocations?

A. Generally, service company recipient allocation is a process for ESL to capture and allocate the costs associated with services it provides to itself like information technology, desktops and telephones, facilities-related costs like rent and space-management, and human resources costs and then allocate those costs to affiliates using the services of ESL.[55]

Q. Are all the requested internal rate-case expenses allocated to ETI by ESL?

A. It is unclear whether some of the requested rate-case expenses designated as internal costs are actually incurred directly by ETI or allocated from ESL. On page 1 of Exhibit REL-SD1-5 such expenses are labeled as "Non-Affiliate Resource Desc."[56] However, on Page 3 of that same exhibit, the exact same amount is labeled as "Non-Payroll Affiliate Resource Desc."[57] Whether these expenses are ETI's own directly incurred costs or are allocated costs from ESL, my recommendation would be the same.

Q. How does ETI justify its requested level of internal rate-case expenses?

A. ETI maintains that "[t]he level of internal rate case expenses and participation by internal witnesses is consistent with the execution and litigation of a base-rate proceeding for an integrated utility with a substantial affiliate case for which the Commission's affiliate standards must be met."[58] Additionally, ETI explained that its requested internal rate-case expenses for Docket No. 53719 are captured in Project Code F3PPTRCT22, which is used solely for time and expense related to this rate case and that all costs incurred by ESL for this project are directly billed to ETI.[59] Similarly, ETI noted that its internal

[55] *Id.* at 56:14 – 57:1.

[56] Lain Supplemental, Exhibit REL-SD1-5 at 1.

[57] *Id.* at 3.

[58] Lain Direct at 34:12-15.

[59] *Id.* at 26:3-6.

rate-case expenses for Docket No. 49916 were captured in Project Code F3PPTXFRCT, which was only used for the time related to the 2019 fuel reconciliation proceeding and that all costs incurred by ESL for this project were directly billed to ETI.[60]

Q. What is your recommendation with respect to ETI's requested payroll expenses, depreciation expense, and service company recipient allocations as internal rate-case expenses?

A. I recommend disallowance of the requested payroll expenses, depreciation expense, and service company recipient allocations as internal rate-case expenses. I disagree that ETI's requested level of internal rate-case expenses is consistent with those of other integrated utilities with substantial affiliate cases. I am not aware that any of the other integrated utilities with substantial affiliate cases request as rate-case expenses employee payroll and payroll-related costs allocated from their respective affiliated service companies, nor am I aware of any vertically integrated utilities that request items like depreciation expense and service company recipient allocations as rate-case expenses. ETI has not demonstrated that the internal payroll and associated loaders, depreciation expense, and service company recipient allocations requested as rate-case expenses are different from the internal payroll costs, depreciation expense, and associated loaders of other utilities in Texas that use the services of affiliate service companies in the preparation and filing of rate cases and that do not consider such expenses to be incremental costs (and do not include such costs in their requested rate-case expenses).

Q. Has the Commission previously addressed the types of internal rate-case expenses ETI requests?

A. The Commission has previously allowed as rate-case expenses some amounts of ESL payroll and associated loaders as part of settled cases. For example, the rate-case

[60] *Id.* at 26:13-16.

expenses associated with Docket No. 41791[61] were approved as part of the settlement in the overall rate case where there is typically give and take on a multitude of issues. The Commission also allowed recovery of the ESL payroll and associated loaders in one contested case, Docket No. 40295,[62] where the ESL payroll costs and loaders were not specifically contested by any party.

With respect to depreciation expense requested as a rate-case expense, in Docket No. 40295, the Commission disallowed the depreciation expense of ETI affiliate ESL that was requested as a rate-case expense.[63] The PFD in that case specifically noted that "ETI has not cited to any precedent which would justify the recovery of these apparently unusual rate case expenses. Moreover, ETI has failed to prove the reasonableness of the expenses under the more stringent standards that are applicable to affiliate expenses."[64] In upholding the Commission's disallowance of affiliate depreciation expense as a rate-case expense, in its review of ETI's appeal, the Texas Court of Appeals, Third District, at Austin (the Court) noted that:

> For instance, the Commission could have found that the primary evidence submitted by Entergy in this docket on the issue— a spreadsheet that does not identify which assets were depreciated or their original costs, how the depreciation was calculated, which employees used the assets, or how the assets were amortized—was not sufficiently specific for Entergy to meet its burden of proof on its depreciation expenses attributable to rate-case services. *Cf.* Tex. Util Code § 36.058(b) (Commission may allow payment to affiliate only upon *specific finding* of reasonableness of *each item or class of items* allowed).[65]

The Court further explained that:

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[61] Docket No. 41791, Order (May 16, 2014).

[62] *Application of Entergy Texas, Inc. for Rate Case Expenses Pertaining to Docket No. 39896,* Docket No. 40295. Order (May 21, 2013).

[63] Docket No. 40295, Order at Finding of Fact No. 18a.

[64] Docket No. 40295, PFD at 12.

[65] *Entergy Texas, Inc. v. Pub. Util. Comm'n of Texas,* No. 03-14-00706-CV, 2016 WL 1170985 (Tex. App. Mar. 24, 2016) at 8. *See* Attachment RS-8.

> For example, the Commission argues that the testimony in the underlying docket on which Entergy relies as providing some of the missing depreciation detail is not relevant because it refers to expenses incurred during the test year rather than rate-case expenses, many of which occurred *after* the test year, and is unclear about whether the same assets were being depreciated in both time frames.[66]

Whether the depreciation expense requested as a rate-case expense is that of ETI or of its affiliate, ESL, both should be disallowed as rate-case expenses. The depreciation expense of ETI and an allocated portion of ESL's depreciation expense is already included in ETI's current and requested base rates. ETI has provided no evidence that the depreciation requested as rate-case expense is related to assets for which depreciation expense is not already included in its current or requested base rates, nor has it demonstrated how ETI or ESL would not have incurred such depreciation expense absent the rate case and fuel reconciliation proceedings. If the depreciation expense requested as rate-case expense is that of ESL, ETI has not provided the evidence the Court explained was necessary for inclusion, and the Court has already addressed why affiliate depreciation expense should be excluded from recovery as a rate-case expense in the citation from the case, presented above.

Q. Did the Court provide any further guidance on the issue of affiliate expenses requested as rate-case expenses?

A. Yes. The Court further explained that:

> We also reject Entergy's argument that the Commission's disallowance was unreasonable because similar expenses were deemed reasonable and necessary for inclusion in the rate base in the underlying rate case. The statutory standards for recovery of reasonable and necessary expenses for rate cases and rate-case expense cases are different. *Compare* Tex. Util. Code § 36.051 (in establishing utility' rates, Commission shall establish overall revenues at amount that will permit utility reasonable opportunity to earn reasonable return on utility's invested capital in excess of its reasonable and necessary *operating expenses) and* 16 Tex. Admin. Code. 25.231(a) (Pub. Util. Comm'n, Cost of Service) (expense may be included

[66] *Id.* at Footnote No. 13

> to extent that it is based upon "cost of rendering service to the public during a historical test year"), *with* Tex. Util. Code § 36.061(b)(2) (Commission *may* allow as cost or expense reasonable costs of *participating in proceeding* under PURA not to exceed amount approved by Commission). Furthermore, this Court has previously rejected the very same argument, in which a utility made "a subtle, yet impermissible leap" in arguing that because a utility may recover an expense as a payment to an affiliate as an expense or cost of service in a ratemaking proceeding, it is thereby entitled to those same expenses as "rate case expenses." *City of Port Neches v. Railroad Comm'n,* 212 S.W.3d 565, 581 (Tex. App.—Austin 2006, no pet.).[67]

In the referenced *Port Neches v. Railroad Comm'n* case the Court ruled that:

> [T]he leap cannot be made from this fact to TGS's conclusion that any fee incurred by TGS in presenting its "cost of service" argument is automatically recoverable as a rate case expense. This is where the Commission's discretion, as discussed above, plays an integral role.[68]

The Court went on to say that:

> Even if the Commission was persuaded by a portion of Dively's testimony, this does not, as a matter of law, entitle TGS to recover the cost of her fees.[69]

This is exactly what ETI attempts to do with respect to the ESL expenses requested as rate-case expenses in this proceeding. ETI tries to make an "impermissible leap" by referencing its affiliate testimony related to test-year expenses to support its requested ESL expenses as rate-case expenses. Most of these expenses were (or will be) incurred after the end of the calendar year 2021 test period, the period for which costs were addressed by the affiliate witnesses in this case. According to the Court, simply referencing the affiliate testimony related to the test year as ETI has done does not meet the stringent standard for determining reasonableness of affiliate expenses incurred after the test year.

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[67] *Id.* at Footnote No. 15.

[68] *City of Port Neches v. R.R. Comm'n of Texas,* 212 S.W.3d 565, 581(Tex. App. 2006,). *See* Attachment RS-8.

[69] *Id.* at 581-582.

This finding by the Court is especially relevant to the current case because of changes to ESL payroll and related allocations after the test year (for employee raises and changes to other expenses, as evidenced by ETI's proposed adjustments to its ESL test year expenses in its requested rates). In response to discovery, ETI admitted that the payroll loaders for 2022 are different from the test year period because of changes in the components used in the calculations over time, even though the methodologies used to calculate the factors are the same.[70] The reasonableness of those changed components themselves have not been addressed by ETI and what might have been deemed a reasonable method of calculating the allocation factors during the test year might not be considered reasonable for a subsequent time period.

Q. Are there other factors that make the Court's ruling in the above-referenced cases germane to ETI's current rate case?

A. Yes. The Court's rulings are highly significant considering the challenges to ETI's affiliate expenses in the current case. For example, ETI reflected adjustments to its test year costs to remove from its proposed rates what it alleges are the total amounts of financial based incentive compensation costs that are typically disallowed by the Commission. However, as shown by the testimony of Staff and intervenors in this case, there is extensive disagreement as to what constitutes financial based incentive compensation and whether ETI removed the appropriate amounts of such items from its cost of service. ETI claims that it removed financial based incentive compensation from the ESL payroll amounts requested as rate-case expenses,[71] but if it calculated those adjustments in the same manner as it did for the base rate revenue requirement, Staff and other intervenors would also take issue with the amounts not appropriately removed from

[70] Response of Entergy Texas, Inc. to Staff's Seventh Request for Information: Staff 7-1 through Staff 7-13 (ETI's Response to Staff's Seventh RFI), Question No. Staff 7-13 (Oct. 20, 2022). *See* Attachment RS-9.

[71] ETI's Response to Staff's Seventh RFI at Question No. Staff 7-12. *See* Attachment RS-10.

ETI's rate-case expense request. ETI admits that its calculated adjustments with respect to financial based incentive compensation excluded from the requested payroll-related loaders as rate-case expense are merely approximations.[72] It is therefore possible that actual amounts of financial based incentive compensation are included in ETI's requested internal rate-case expense request.

Q. Are there other reasons that the Commission should reject ETI's request to recover as rate-case expenses the payroll and associated loader allocations of ESL, including the service company recipient allocations?

A. Yes. It is unreasonable to attach a higher level of importance or significance to a single ESL project code just because it happens to be related to the preparation and prosecution of a rate case without giving any consideration to other factors or other project codes that could completely offset or otherwise mitigate any impact the rate-case expense project has on the amounts ETI pays to ESL for service in any particular period. An examination of ETI's request in Docket No. 48439,[73] the separate proceeding established to examine the rate-case expenses associated with ETI's last base rate case, Docket No. 48371,[74] highlights the unreasonableness of allowing ETI to separately recover as rate-case expenses the payroll costs and various loaders for work performed by employees of ESL for assistance in the preparation and litigation of this rate case, Docket No. 53719.

Q. Please explain.

A. In Docket No. 48439, similar to this current case, ETI requested internal rate-case expenses that it described as incremental expenses the Company would not have incurred

[72] ETI's Response to Staff's Seventh RFI at Question No. Staff 7-11. *See* Attachment RS-11.

[73] *Review of the Rate Case Expenses Incurred in Docket No. 48371,* Docket No. 48439, Order (Feb. 14, 2020).

[74] Entergy Texas, Inc.'s Statement of Intent and *Application for Authority to Change Rates,* Docket No. 48371, Order (Dec. 20, 2018).

absent Docket Nos. 48371 and 48439.[75] ETI explained that in addition to its own direct expenses, its internal rate-case expenses also included costs billed by ESL for services supporting Docket Nos. 48371 and 48439.[76] Like the present case, ETI described how its requested ESL internal rate-case expenses for that case were tracked in Project Code No. F3PPTRCT18, which was only used for the time and expense related to those two specific cases, and that all costs incurred by ESL under that project code were directly billed to ETI.[77] ETI asserted that by requiring ESL to bill all costs to that specific project code, and because it did not request recovery of the costs in that code through base rates, it ensured that there was no double recovery.[78] Also similar to the current case, the majority of the requested ESL internal rate-case expenses for Docket No. 48371 were incurred in 2018, after the 2017 test year in that proceeding, and ETI made an adjustment to remove the $5,263 that was incurred in 2017.[79]

The amount of ESL internal payroll costs and loaders (service company recipient loader, payroll loader allocation, and benefits and pension loader allocation) that ETI sought as rate-case expenses in Docket No. 48439 for the Docket No. 48371 rate case was $2,247,186.[80] After Staff and OPUC recommended disallowance of this amount requested as internal rate-case expenses, ETI asserted in its rebuttal testimony in that case that it incurred approximately $1.9 million more in ESL labor charges in 2018, the year in which Docket No. 48371 was prepared and prosecuted, than in the 2017 test year, presenting the following table to support its claim:[81]

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[75] Docket No. 48439, Direct Testimony of Richard E. Lain at 9:4-5.

[76] *Id.* at 9:6-8.

[77] *Id.* at 9:15-18.

[78] *Id.* at 9:18-21.

[79] Docket No. 48439, Rebuttal Testimony of Barbara P. Heard at 15:15-17.

[80] Docket No. 48439, Rebuttal Testimony of Barbara P. Heard at 4:12-13.

[81] Docket No. 48439, Rebuttal Testimony of Barbara P. Heard at 18:22-26.

ESL Labor Charges to ETI in 2018 and 2017

	2018	2017 (test year)
Direct TX Charges for Project Code F3PPTRCT18	$2,247,186	0
All Other Direct Tx Charges	$2,402,679	$2,718,957
Allocated Charges to ETI	$1,647,011	$1,694,058
Total	**$6,296,876**	**$4,413,015**

In arguing that ETI should recover the full $2.2 million associated with Project Code F3PPTRCT18 and not just the 2018 incremental labor charges of $1.9 million, ETI explained that "[i]t is well-established that base rates are based on a historical test year and that actual costs may vary in any given year."[82] Additionally, ETI acknowledged that it is responsible for paying only the actual costs incurred,[83] and defended its request for the higher amount by asserting that while the allocated amounts from ESL may decrease or increase year to year, that "is the nature of establishing rates based on a historical test year and treating rate case expenses as a separate item."[84] This admission by ETI supports the unreasonableness of allowing ETI to recover one specific post test year project code in isolation just because it happens to be for rate-case expenses while ignoring or disregarding what is happening with other project codes that may decline and offset the charges for that code, thus reducing the overall total charges to ETI from ESL. That is exactly what happened between the 2017 Docket No. 48371 test year to calendar year 2018.

[82] *Id.* at 19:7-8.

[83] *Id.* at 16:11-13.

[84] *Id.* at 16:23-26.

Q. How do you know that is what happened between the 2017 test year and calendar year 2018?

A. A review of ETI's Annual Report of Affiliate Activities for the years 2017 and 2018 filed in Project No. 36867 on the Commission's interchange validates this and confirms that total charges to ETI from ESL in 2018 (the year that Docket No. 48371 was prepared and prosecuted, and the period the majority of the $2,247,186 of ESL charges ETI requested as rate-case expenses for that case were incurred) actually went down when compared to the 2017 test year used in the rate case — from a total of $140,393,276 in 2017 to a total of $137,827,340 in 2018.[85] As discussed above, ETI itself asserted in Docket No. 48439 that it only pays the actual charges from ESL in any given year, and its own affiliate report to the Commission confirms that ESL billed ETI $2.5 million less in 2018 than in 2017 even though ETI claimed it paid $1.9 more in labor charges in 2018 than in 2017. The following table demonstrates how the ESL charges to ETI vary year-to-year:[86]

Year	Total ESL Charges to ETI	% Change Year to Year
2011	$ 87,240,388	
2012	$ 87,422,590	0.21%
2013	$103,871,599	18.82%
2014	$ 86,169,225	-17.04%
2015	$105,289,318	22.19%
2016	$117,301,094	11.41%
2017	$140,393,276	19.69%
2018	$137,827,340	-1.83%
2019	$171,431,833	24.38%
2020	$170,500,783	-0.54%
2021	$186,860,018	9.59%

[85] *See* Attachment RS-12.

[86] *Id.*

Q. Are there other rationales for not treating the rate-case expense project code differently than other ESL project codes?

A. Further proof of the unreasonableness of considering in isolation one affiliate project code that happens to be related to rate-case expenses that may increase costs temporarily for one year without taking into account that other project codes may be decreasing or eliminated is confirmed in ETI's response to Staff RFI Question No. Staff 8-2.[87] ETI's response to Staff 8-2 shows that not only do the specific project codes to which ESL bills costs to ETI vary from year to year, the actual costs billed to each specific project code varies from year to year. Rates are not set to recover utility expenses on an exact dollar-for-dollar basis, but rather based on a representative test year amount of total costs adjusted for known and measurable changes (both those that increase expenses and those that decrease expenses). The rate-case expense project code is just one of many ESL project codes and should not be singled out for special treatment.

Finally, as noted above, ETI requests known and measurable changes to increase its own test-year payroll costs as well as to increase the test-year payroll costs allocated to it by ESL in its proposed rates for employee raises that occurred during the test year and in 2022. The relate-back date for rates in this proceeding resulting from ETI's request under PURA § 36.211(b) is December 3, 2022. That date is prior to the incurrence of costs for the hearing on the merits, post-hearing briefings, exceptions to the PFD and any motions for rehearing in this proceeding. To the extent the rates from this case that become effective December 3, 2022 include ETI's requested increase to its own and ESL's payroll costs, and to the extent that the 2022 raises are also reflected in the actual charges to the rate-case expense project subsequent to December 3, 2022 for work on the hearing, briefing, exceptions and motions for rehearing, ETI could be double-

[87] Response of Entergy Texas, Inc. to Staff's Eighth Request for Information: Staff 8-1 through Staff 8-3 (ETI's Response to Staff's Eighth RFI), Question No. Staff 8-2 (Oct. 26, 2022). *See* Attachment RS-13.

recovering the post test year payroll increases (once through the test year payroll adjustment reflected in the new rates and again as charges for work on the rate case).

Q. Do 16 TAC § 25.245 or PURA § 36.061 preclude the Commission from disallowing these payroll expenses, service company recipient allocations and depreciation expense as rate-case expenses?

A. The Commission explained in Project No. 41622, the rulemaking project where 16 TAC § 25.245 was adopted, that, while costs requested as rate-case expenses may on the surface appear to be reasonable, the Commission must consider all relevant factors in determining whether a cost may reasonably be recovered as a rate-case expense.[88] In declining to make changes to the proposed 16 TAC § 25.245 related to the burden of proof in response to comments received in the project, the Commission noted that "The result would be to shift the burden to parties challenging the reasonableness of particular expenses and potentially preclude the exclusion from disallowing certain items that have met the threshold test but would be unreasonable upon full consideration of all relevant evidence.[89] All relevant factors discussed above establish that allowing ETI to recover as rate-case expenses ESL payroll, affiliate recipient and depreciation expense is not reasonable.

Although 16 TAC § 25.245 makes no mention of affiliate transactions per se, PURA § 36.058 is very clear that payments to affiliates for services may not be allowed unless the Commission makes explicit findings that they are reasonable and necessary. Texas courts have previously ruled that the testimony and Commission findings related to affiliate transactions in the test year do not apply to those expenses incurred in 2022, after the 2021 test year in this case. The Commission's rate-case expense rule does not

[88] Project No. 41622, Order at 56.

[89] *Id.*

override the explicit exclusion of affiliate expenses absent the specific mandates in PURA § 36.058. Disallowance of the requested internal rate-case expenses of ESL is within the Commission's discretion under PURA § 36.061 and 16 TAC § 25.245.

Q. What is your proposed disallowance for payroll expenses, service company recipient allocation, and depreciation expense requested as rate-case expenses?

A. I recommend the following disallowances based on the information provided by ETI to date:

	Dkt No. 49916	Dkt No. 53719
Payroll and Associated Loaders	$368,597	$1,647,342
Service Company Recipient Allocations	$ 44,707	$ 160,883
Depreciation Expense	$ 31,775	$ 112,688
TOTAL	$445,079	$1,920,913

To the extent ETI requests additional expenses for any of these items, my recommendation will be adjusted accordingly.

2. Other Internal Rate-Case Expenses

Q. In addition to payroll costs, service company recipient allocations, and depreciation expense, do you have adjustments to other types of costs ETI is requesting as internal rate-case expenses?

A. Yes. I do not take issue in theory with recovery as rate-case expense items such as travel and meal expense, supplies, postage and delivery charges, temporary employee expense, and advertising expense that are incurred as a direct result of the ratemaking proceedings. However, it is not reasonable for other expenses that are not directly caused by those cases to be recovered as rate-case expenses. Some of the invoices submitted as support for ETI's requested internal rate-case expenses show purchases of items that should not reasonably be recovered as rate-case expenses. These items include: a CD/DVD duplicator (with a three-year protection plan) that can be used for multiple other tasks and

projects, not just the rate case, business cards, ID card reels, calendars, delivery of bottled water and snacks to the office, rent for a bottled water dispenser, employee birthday celebration, charger for a Thinkpad, hand sanitizer, and a meal for seven people that cost $236. Copies of invoices for these questionable expenses are included at Attachment RS-14. To the extent any of those expenses are included in ETI's request, they should be disallowed as unreasonable rate-case expenses. Additionally, invoices for some expense categories appear to be missing from the supporting documentation provided.

While I am able to directly trace some supporting documentation to ETI's itemization of its requested internal rate-case expenses at Exhibit REL-SD1-5 to the supplemental direct testimony of Mr. Lain, I am not able to do so for all of the requested expenses. ETI should provide in its rebuttal testimony a reconciliation of the internal rate-case expenses for both proceedings as shown at Exhibit REL-SD1-5 to the supplemental direct testimony of Mr. Lain with the accompanying supporting documentation, including references to bates page numbers of the supporting documentation. I will quantify my recommended adjustment related to these other internal rate-case expenses after I receive the required reconciliation.

C. CITIES' RATE-CASE EXPENSES

1. Docket No. 49916

Q. You stated earlier that Cities provided testimony and documentation in support of their rate-case expenses associated with Docket Nos. 49916 and 53719. What is Cities' request with respect to rate-case expenses for Docket No. 49916?

A. Cities requests the following rate-case expenses associated with participation in Docket No. 49916:

Cities' Rate Case Expenses Dkt. No. 49916[90]

Legal	
Lawton Law Firm	**$ 27,574**

Q. Did you identify any issues with respect to the rate-case expense request of Cities related to Docket No. 46649?

A. No, I did not identify any issues related to Cities' requested rate-case expenses for Docket No. 49916.

2. Current Proceeding (Docket No. 53719)

Q. What is Cities' request with respect to rate-case expenses for the current proceeding?

A. Cities' requested rate-case expenses through September 30, 2022 for this proceeding are as follows:

Cities' Rate Case Expenses Dkt. No. 53719 through September 30, 2022[91]

Legal	
Lawton Law Firm	**$ 115,256**
Consultants	
Resolve Utility Consultants	**$ 31,781**
Garrett Group	**$ 46,820**
Nova Energy Consultants	**$ 7,990**
Resolved Energy Consulting	**$ 9,317**
TOTAL	**$ 211,164**

[90] Gordon Direct at 14:17–15:3.

[91] Gordon Direct at Schedule NJG-1, Page 1.

Q. Did you identify any issues with respect to the rate-case expense request of Cities related to Docket No. 53719?

A. No. I did not identify any issues related to Cities' requested rate-case expenses for Docket No. 53719.

Q. Are these your final recommendations with respect to the rate-case expenses of ETI and Cities in this proceeding?

A. No. As stated previously, both ETI and Cities represent that they expect to file additional supplemental testimony or affidavits related to additional expenses incurred in this proceeding. If that is the case, I expect to file supplemental testimony to address any additional rate-case expenses requested by ETI and Cities. Because of this, my recommended disallowances explained above should not be construed as my final recommendation for this proceeding at this point. To the extent there are redacted invoices, hourly billing rates in excess of $550 per hour, additional unreasonable internal rate-case expenses, or expenses that otherwise do not comply with § 25.245 in the yet-to-be provided rate-case expenses for this proceeding, my recommendation will be adjusted accordingly.

In addition to expense documentation, 16 TAC § 25.245 requires a determination of the extent to which the rate-case expenses as a whole were disproportionate, excessive, or unwarranted in relation to the nature and scope of the rate case addressed by the evidence.[92] That determination cannot be made at this time.

[92] 16 TAC § 25.245(c)(5).

Q. How do you propose ETI and Cities recover their trailing rate-case expenses for this proceeding that are not reviewed and addressed in this case through supplemental filings?

A. I recommend that ETI record its rate-case expenses incurred after the cutoff date in this docket in a regulatory asset. I recommend that ETI also record the reimbursed expenses of Cities incurred after the cutoff date in this same regulatory asset. Finally, I recommend that the Commission's order contain a provision that permits ETI to request recovery of this Docket No. 53719 rate-case expense regulatory asset in its next base rate case.

Q. Does this conclude your testimony?

A. Yes.

LIST OF PREVIOUS TESTIMONY
Before the Public Utility Commission of Texas

Docket No. 9874:
Application of Kimble Electric Cooperative, Inc. for Authority to Change Rates

Docket No. 9981:
Inquiry of the General Counsel into the Reasonableness of the Rates and Services of Central Telephone Company of Texas

Docket No. 13050:
Application of Rayburn Country Electric Cooperative, Inc. for Authority to Change Rates

Docket No. 12065:
Complaint of Kenneth D. Williams Against Houston Lighting and Power Company

Docket No. 14980:
Application of Southwestern Public Service Company Regarding Proposed Business Combination with Public Service Company of Colorado

Docket No. 17751:
Texas-New Mexico Power Company's Application for Approval of the TNMP Transition Plan and Statement of Intent to Decrease Rates, and Appeal of Municipal Rate Actions

Docket No. 29206:
Application of Texas-New Mexico Power Company, First Choice Power, Inc., and Texas Generating Company, L.P. to Finalize Stranded Costs Under PURA §39.262

Docket No. 28813:
Petition to Inquire into the Reasonableness of the Rates and Services of Cap Rock Energy Corporation

Docket No. 31994:
Application of Texas-New Mexico Power Company to Establish a Competition Transition Charge

Docket No. 32766:
Application of Southwestern Public Service Company for: (1) Authority to Change Rates; (2) Reconciliation of its Fuel Costs for 2004 and 2005; (3) Authority to Revise the Semi-Annual Formulae Originally Approved in Docket No. 27751 used to Adjust its Fuel Factors; and (4) Related Relief

Docket No. 34800:

Application of Entergy Gulf States, Inc. for Authority to Change Rates and to Reconcile Fuel Costs

Docket No. 40627:

Petition for Homeowners United for Rate Fairness to Review Austin Rate Ordinance No. 20120607-055

Docket No. 41430:

Joint Report and Application of Sharyland Utilities, LP, Sharyland Distribution & Transmission Services, and Southwestern Public Service Company for Approval of Purchase and Sale of Facilities, for Regulatory Accounting Treatment of Gain on Sale, and for Transfer of Certificate Rights

Docket No. 41906

Compliance Tariff of CenterPoint Energy Houston Electric LLC Related to Non-Standard Metering and Service Pursuant to PUC SUBST.R.25.133

Docket No. 41901

Compliance Tariff of Texas-New Mexico Power Company LLC Related to Non-Standard Metering and Service Pursuant to PUC SUBST.R.25.133

Docket No. 41890

Compliance Tariff of Oncor Electric Delivery Company LLC Regarding the Rulemaking Related to Advanced Metering Alternatives, Pursuant to PUC SUBST.R.25.133(E)(1)

Docket No. 45747

Application of CenterPoint Energy Houston Electric, LLC to Amend its Distribution Cost Recovery Factor and to Reconcile Docket No. 44572 Revenues

Docket No. 46449

Application of Southwestern Electric Power Company for Authority to Change Rates

Docket No. 48371

Entergy Texas Inc.'s Statement of Intent and Application for Authority to Change Rates

Docket No. 48233

Application of Southwestern Electric Power Company to Implement Base Rate Decrease in Compliance with Docket No. 46449

Docket No. 48071

Joint Application of NextEra Energy Transmission Southwest, LLC and Rayburn Country Electric Cooperative, Inc. to Transfer Certificate Rights to Facilities in Cherokee, Smith, and Rusk Counties

Docket No. 47141

Review of Rate Case Expenses Incurred by Southwestern Electric Power Company and Municipalities in Docket No. 46449

Docket No. 48439

Review of the Rate Case Expenses Incurred in Docket No. 48371

Docket No. 49737

Application of Southwestern Electric Power Company for Certificate of Convenience and Necessity Authorization and Related Relief for the Acquisition of Wind Generation Facilities

Docket No. 50731

Application of Texas-New Mexico Power Company for a Distribution Cost Recovery Factor

Docket No. 50205

Application of Floresville Electric Light and Power System to Change Rates for Wholesale Transmission Service

Docket No. 50790

Joint Report and Application of Entergy Texas, Inc. and East Texas Electric Cooperative, Inc. for Regulatory Approvals Related to Transfers of the Hardin County Peaking Facility and a Partial Interest in Montgomery Power Station

Docket No. 50908

Application of CenterPoint Energy Houston Electric, LLC to Adjust its Energy Efficiency Cost Recovery Factor

Docket No. 50806

Application of El Paso Electric Company to Adjust its Energy Efficiency Cost Recovery Factor and Establish Revised Cost Cap

Docket No. 51215

Application of Entergy Texas, Inc. to Amend its Certificate of Convenience and Necessity for the Acquisition of a Solar Facility in Liberty County

Docket No. 51415

Application of Southwestern Electric Power Company for Authority to Change Rates

Docket No. 51536

Application of Brownsville Public Utilities Board for Transmission Cost of Service and Wholesale Transmission Rates

Docket No. 52195

Application of El Paso Electric Company to Change Rates

Docket No. 53436

Application of Texas-New Mexico Power Company to Amend its Distribution Cost Recovery Factor

Docket No. 52728

Application of the City of College Station to Change Rates for Wholesale Transmission Service

Docket No. 53637

Application of Texas-New Mexico Power Company for Approval to Adjust its Energy Efficiency Cost Recovery Factor and Related Relief

Docket No. 53601

Application of Oncor Electric Delivery Company LLC for Authority to Change Rates

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

MEMORANDUM

TO: State Agencies, University Systems, and Institutions of Higher Education

FROM: Office of the Attorney General – General Counsel Division

DATE: April 2, 2012

RE: New Outside Counsel Rules and Templates

Pursuant to Subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General ("OAG") has recently adopted new administrative rules related to the retention and contracting of outside legal counsel by state agencies, university systems, and institutions of higher education (collectively "agencies"). The OAG has also taken this opportunity to revise many of its processes, procedures, forms, and templates related to the retention and contracting of outside counsel. The purpose of this memorandum is to inform you of those new processes and procedures, and to provide you with a copy of the new administrative rules (Attachment A and Title 1, Chapter 57 of the Texas Administrative Code) and all relevant forms and templates. Because of the many changes, we ask that you review this memorandum and all attached information carefully. We also ask that you share this memorandum and all attached information with your current and potential outside counsel so that they can perform a review as well.

Retention of Outside Legal Counsel. The Attorney General serves as the state's legal counsel, therefore the OAG serves as legal counsel to all agencies. Agencies may not retain or select outside counsel without first receiving authorization and approval from the OAG to do so. If an agency requires legal services from outside counsel, it must first submit to the OAG a completed Request to Retain Outside Counsel form (Attachment B). The request form and any supporting documentation should be sent to the following e-mail address: **general.counsel@texasattorneygeneral.gov**.

Upon receipt, the OAG will review the request form to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the request, the OAG will notify the agency in writing that its request has either been approved or denied, or that additional information is required to make a decision. Please remember that an approval to retain outside counsel does not constitute approval of an outside counsel contract.

Competitive Procurement Process. Previously, an agency was generally required to publish a Request for Proposals or a Request for Information before selecting outside counsel. Now, unless an exemption is granted by the OAG, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel. The RFQ must be published in the Texas State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency's discretion. Please note that the RFQ may be published before or after the Request to Retain Outside Counsel form has been submitted to the OAG. The OAG will not review or

approve an agency's RFQ, therefore the agency is not required to provide a copy of the RFQ to the OAG.

If an agency would like an exemption from the RFQ process requirements, it must provide the OAG with a reasonable justification for the exemption in its Request to Retain Outside Counsel form. Previously, the OAG granted a waiver from the competitive procurement process requirements if the maximum liability of an outside counsel contract was not anticipated to equal or exceed $25,000. Now, however, agencies must follow the RFQ process requirements regardless of the anticipated maximum liability of a contract, unless a specific exemption is granted by the OAG.

Previously, responses to Requests for Proposals and Requests for Information were generally valid for two years after publication of the request. Now, the respective agency will determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

Outside Counsel Contract. After obtaining authorization to retain outside counsel and completion of the RFQ process (unless exempted), an agency may enter into a contract with its selected outside counsel. However, that contract must be approved by the OAG in order to be valid and enforceable. The OAG has revised its standard Outside Counsel Contract ("OCC") template (Attachment C), and as of the date of this letter, that template must be used by the agency and outside counsel. If an agency determines that a change to the contract template is required in a particular instance, the agency must request, in writing, and receive permission from the OAG to make the change before the modified contract is used. Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with our contract template.

The agency and the outside counsel will complete and sign the outside counsel contract before submitting the contract to the OAG for review. Previously, the OAG required three signed copies of the contract. Now, the OAG will only require one signed copy to be submitted. The outside counsel contract and any supporting documentation should be sent to the following e-mail address: **general.counsel@texasattorneygeneral.gov.** After reviewing the contract, the OAG will either approve the contract and return it to the agency or notify the agency that the contract has been rejected.

When completing the outside counsel contract, please be mindful of the following changes:

Total Liability to Outside Counsel - The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the contract cap amount.

Contract Term -The start date and end date of the contract term.

- Unless approved by the OAG, most contract terms will end on or before August 31st of the current biennium.
- Contracts for active litigation may be allowed to end, regardless of the biennium, upon the conclusion of the litigation.

- Except by amendment, the agency shall no longer have the right to extend the term of the contract. Previously, agencies had a right (section 2.2 of the previous contract template) to extend the term of the contract by 12 months.

Addendum B to the Contract:

Timekeeper Rates – Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed $525/hour, while hourly rates for paralegals shall not exceed $225/hour. Outside counsel may not bill for administrative staff, law clerks, or interns. A rate range for each timekeeper classification can be used instead of specifically identifying each timekeeper by name and hourly rate. A rate range provides more flexibility during the term of the contract than specifically identifying each timekeeper. However, if the agency wants to ensure that certain timekeepers are providing the legal services, identifying each timekeeper may be preferred.

- An example of rate range would be "Partners are $250/hr to $300/hr."
- An example of specifically identifying a timekeeper would be "Susan Smith, Partner, $250/hr."

Previously, the hourly rates or rate ranges specified in a particular contract were generally required to remain unchanged, and an attorney listed at a particular rate or range could not be reclassified more than once during a twelve month period. These limitations will no longer apply. However, any changes to the contract will still require OAG approval (see "Amending an Outside Counsel Contract" discussion on page 6 of this memorandum).

Fixed Fee or Fee Schedule for Projects or Matters - Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be appropriately billed by a fixed fee per project.

- An example of a fixed fee per project would be "H-1B Visa Petition is $900"

Billing Period – The billing period is the interval specified in the contract which determines the frequency Outside Counsel will submit invoices to the agency. The agency and outside counsel will determine the billing period for a particular contract. For most contracts, the billing period will likely be monthly.

Travel Rate – Previous versions of the contract template did not specify a rate for travel time for attorneys traveling on Agency matters. In Addendum B of the new contract template, the Agency and Outside Counsel are now permitted, but not required, to pay for travel time by setting travel rates. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC. If travel rates are not set in an OCC, Outside Counsel may not charge or seek reimbursement for time spent traveling on Agency matters. If an attorney is providing legal services while traveling, however, the attorney may charge the standard hourly rate.

Contract Number - The OAG establishes a contract number for each outside counsel contract. Agencies may establish their own contract number in addition to the OAG's Contract Number; however, agencies must note the OAG contract number in all submissions to the OAG.

Law License – An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC will require Outside Counsel to provide legal services and advice on Texas law, then a Texas licensed attorney must be utilized and named in Addendum B. A law firm with no Texas licensed attorneys will not be authorized to provide legal services and advice concerning Texas law.

Invoices for Legal Services and Expenses. Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the outside counsel contract and administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel invoice in accordance with the administrative rules, it must seek approval from the OAG to pay the invoice.

When an agency determines that an invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval form (Attachment D). The completed Request for Voucher Approval form, a copy of the invoice at issue, and all other information required to be submitted by the administrative rules should be sent to the following e-mail address: **OCCInvoice@texasattorneygeneral.gov**. Note that an agency may only submit one Request for Voucher Approval form per billing period per contract, but one request form may be used for multiple invoices from the same billing period.

The agency must submit the Request for Voucher Approval form and other required information to the OAG within 10 business days of the agency's receipt of a correct and complete invoice from the outside counsel.

Once the Request for Voucher Approval form and other information are received and reviewed by the OAG, the invoice(s), or a portion thereof, will either be approved or rejected. If approved, the OAG will issue a Voucher Approval to the agency, which may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the invoice(s). Agencies should begin using Comptroller Code 7258 as soon as practicable when entering payment information into USAS. Comptroller Code 7246 will remain a viable option for the immediate future, but agencies will not be permitted to use that code after the current biennium. Previously, after issuing a Voucher Approval to an agency, the OAG would also approve payment of an invoice in USAS. Now, however, the OAG will no longer perform that second approval. Therefore, once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If an invoice(s) is rejected, or if the OAG has questions regarding an invoice(s), it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with the outside counsel.

Expenses. If an outside counsel bills for allowable expenses, copies of actual receipts must be submitted. The following is a list of some of the expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Administrative Fee. Pursuant to Subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of invoices. The fee is non-refundable and outside counsel may not charge or seek reimbursement from the agency for the fee.

For outside counsel contracts that were entered into on or after June 17, 2011, the administrative fee is due to the OAG on the date that the outside counsel submits to the agency its first invoice after the adoption date of the administrative rules. No administrative fee is due for current contracts that were entered into before June 17, 2011. Any invoice submitted to the OAG for review after the effective date of the administrative rules will be deemed ineligible for payment until the outside counsel submits the requisite administrative fee to the OAG. For outside counsel contracts that cross the state's fiscal biennium(s), separate administrative fees are due to the OAG for every fiscal biennium covered under the term of the contract.

Please note that an administrative fee is not due for each invoice submitted. For most contracts, it will be a one-time fee.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	Administrative Fee
Less than $2,000.00, but more than $0.00	$100.00
Equal to or greater than $2,000.00 but less than $10,000.00	$200.00
Equal to or greater than $10,000.00 but less than $50,000.00	$500.00
Equal to or greater than $50,000.00 but less than $150,000.00	$1,000.00
Equal to or greater than $150,000.00 but less than $1,000,000.00	$1,500.00
Equal to or greater than $1,000,000.00	$2,000.00

If the outside counsel contract is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, the outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee.

Outside counsel will submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Amending an Outside Counsel Contract. Any amendment to an approved outside counsel contract must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment that is signed by the agency and outside counsel. We have included two amendment templates that may be used (Attachment E). The amendment and any supporting documentation should be sent to the following e-mail address: **general.counsel@texasattorneygeneral.gov.**

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's General Counsel Division. Our office will be hosting a training session for all agency outside counsel liaisons. The date, time, and location of this training session will be posted on the OAG's website. Thank you for your attention to these important matters.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

general.counsel@texasattorneygeneral.gov

The Request for Voucher Approval:

OCCInvoice@texasattorneygeneral.gov

Mail may be sent to:
Outside Counsel Contracts
Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:
Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to Candace Harris, Outside Counsel Contract Coordinator, General Counsel Division – Telephone Number (512) 463-9906

Electronic versions of all relevant documents, including the contract template, can be found on the OAG website: **www.texasattorneygeneral.gov**

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

MEMORANDUM

TO: State Agencies, University Systems, and Institutions of Higher Education

FROM: Office of the Attorney General – General Counsel Division

DATE: June 2014

RE: Updates - Outside Counsel Rules and Templates

Pursuant to Subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General ("OAG") has adopted administrative rules related to the retention and contracting of outside legal counsel by state agencies, university systems, and institutions of higher education (collectively "agencies"). Effective June 5, 2014, the OAG has amended those administrative rules regarding the requirements for outside counsel to submit a disclosure statement related to conflicts of interest to the agency as well as for the agency to submit to the OAG information related to the disclosure statement when the outside counsel contract is submitted to the OAG for approval.

Therefore, the OAG is taking this opportunity to revise some of its processes, procedures, forms, and templates related to the retention and contracting of outside counsel. The purpose of this memorandum is to inform you of these updates and to suggest you visit the OAG's website at www.texasattorneygeneral.gov to access the revised forms and templates. Because of these changes, we ask that you review this memorandum carefully. We also ask that you share this memorandum with your current and potential outside counsel so that they can perform a review as well.

Retention to Retain Outside Legal Counsel. The Attorney General serves as the state's legal counsel, therefore the OAG serves as legal counsel to all agencies. Agencies may not retain or select outside counsel without first receiving authorization and approval from the OAG to do so. If an agency requires legal services from outside counsel, it must first submit to the OAG a completed Request to Retain Outside Counsel form. The request form and any supporting documentation should be sent to the following e-mail address: **general.counsel@texasattorneygeneral.gov**.

Upon receipt, the OAG will review the Request to Retain to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the request, the OAG will notify the agency in writing that its Request to Retain has either been approved or denied, or that additional information is required to make a decision. Please remember that an approval to retain outside counsel does not constitute approval of an outside counsel contract.

Competitive Procurement Process. Unless an exemption is granted by the OAG, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel. The RFQ must be published in the Texas State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency's discretion. Please note that the RFQ may be published before or after the Request to Retain Outside Counsel has been submitted

to the OAG. Since the OAG will not review or approve an agency's RFQ, the agency is not required to provide a copy of the RFQ to the OAG. Likewise, it is up to the respective agency to determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

If an agency would like an exemption from the RFQ process requirements, it must provide the OAG with a reasonable justification in writing for the exemption in its Request to Retain Outside Counsel. Agencies must follow the RFQ process requirements regardless of the anticipated maximum liability of a contract unless a specific exemption is granted by the OAG.

Outside Counsel Disclosure Statement Regarding Conflicts of Interest. Effective June 5, 2014, Sections 57.4 and 57.5 of the OAG's administrative rules were amended to provide a formalized process for the disclosure of potential conflicts of interest by selected outside counsel.

New rule §57.4(d) and (e) provides as follows:

> (d) Conflict of Interest.
>
> (1) After selecting the Outside Counsel, the Agency shall require the law firm to submit a written disclosure statement identifying every matter in which the firm represents, or has represented, within the past calendar year, any entity or individual in any litigation matter in which the entity or individual is directly adverse to the State of Texas or any of its boards, agencies, commissions, universities, or elected or appointed state agency officials in connection with their official job duties and responsibilities. "Litigation" means the matter has been filed in the public record in either state or federal court.
>
> (2) If a disclosure statement is submitted, it must include a short description of the nature of the matter and the relief requested or obtained in each matter and any identifying cause or case number.
>
> (e) The Agency shall determine given the disclosure statement whether to continue with its choice of Outside Counsel.

New rule §57.5 provides as follows:

> (e) Agency shall submit to the OAG the disclosure statement previously submitted by the selected Outside Counsel to the Agency. If the Agency is satisfied in its choice of Outside Counsel selected, the Agency shall submit to the OAG an affirmative statement that it is satisfied in its choice of selected Outside Counsel notwithstanding the information contained in the disclosure statement.

Therefore, before proceeding to entering into a contract with the selected outside counsel, the agency should obtain the required disclosure from the outside counsel and be prepared to submit that and the agency's affirmative statement to the OAG when the agency forwards the outside counsel contract to the OAG for the OAG's approval.

Obtaining the OAG's Approval of the Outside Counsel Contract. The OAG's approval of the Request to Retain is not the OAG's approval of the resulting Outside Counsel Contract. After obtaining authorization to retain outside counsel and completion of the RFQ process (unless exempted), an agency may enter into a contract with its selected outside counsel. However, that outside counsel contract ("OCC") must be approved by the OAG in order to be valid and enforceable. The OAG's standard Outside Counsel Contract template is posted on the OAG's website which must be used by the agency and outside counsel. If an agency determines that a change to the contract template is required in a particular instance, the agency must request, in writing, and receive permission from the OAG to make the change before the modified contract is used. Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with our contract template.

The agency and the outside counsel will complete and sign the outside counsel contract before submitting the contract to the OAG for review. The OAG only requires one signed copy of the OCC to be submitted. The outside counsel contract and any supporting documentation should be sent to the following e-mail address: **general.counsel@texasattorneygeneral.gov.** After reviewing the OCC, the OAG will either approve it and return it to the agency or notify the agency that the contract has been rejected.

When completing the outside counsel contract, please be mindful of the following:

Total Liability to Outside Counsel - The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the contract cap amount.

Contract Term -The start date and end date of the contract term.

- It is preferred that contract term end on or before August 31st of a biennium.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, upon "the conclusion of the litigation."

Addendum B to the Contract:

Timekeeper Rates – Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed $525/hour, while hourly rates for paralegals shall not exceed $225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns.
- Rate Range - A rate range for each timekeeper classification can be used instead of specifically identifying each timekeeper by name and hourly rate. A rate range provides more flexibility during the term of the contract than specifically identifying each timekeeper. An example of rate range would be "Partners are $250/hr to $300/hr."
  However, if the agency wants to ensure that certain timekeepers are providing the legal services, naming each timekeeper and their individual rates may be preferred. An example of specifically identifying a timekeeper would be "Susan Smith, Partner, $250/hr."

Fixed Fee or Fee Schedule for Projects or Matters - Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be

appropriately billed by a fixed fee per project. An example of a fixed fee per project would be "H-1B Visa Petition is $900."

Billing Period – The billing period is the interval specified in the contract which determines the frequency Outside Counsel will submit invoices to the agency. The agency and outside counsel will determine the billing period for a particular contract. For most contracts, the billing period will likely be monthly.

Travel Rate –In Addendum B of the OCC template, the agency and outside counsel are permitted, but not required, to pay for travel time by setting travel rates. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC of the OCC. If travel rates are not set in an OCC, outside counsel may not charge or seek reimbursement for time spent traveling on agency matters. If an attorney is providing legal services while traveling, however, the attorney may charge the standard hourly rate.

Contract Number - The OAG establishes a contract number for each outside counsel contract. Agencies may establish their own contract number in addition to the OAG's Contract Number; however, agencies must note the OAG contract number in all submissions to the OAG.

Texas Law License – An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC will require Outside Counsel to provide legal services and advice on Texas law, then a Texas licensed attorney must be utilized and named in Addendum B of the OCC. A law firm with no Texas licensed attorneys will not be authorized to provide legal services and advice concerning Texas law. Only in very special circumstances will the OAG approve an outside counsel law firm with no attorneys licensed in Texas, such as when the scope of legal services to be performed is strictly limited to federal law practice only.

Expenses. If an outside counsel bills for allowable expenses, copies of actual receipts must be submitted. The following is a list of some of the expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Invoices for Legal Services and Expenses. Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the outside counsel contract and administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel invoice in accordance with the administrative rules, it must seek approval from the OAG to pay the invoice.

When an agency determines that an invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval form, as posted on the OAG's website. The completed Request for Voucher Approval form, a copy of the invoice at issue, and all other information required to be submitted by the administrative rules should be sent to the following e-mail address: **OCCInvoice@texasattorneygeneral.gov**. Note that an agency should submit one Request for Voucher Approval form per billing period per contract, but one request form may be used for multiple invoices from the same billing period.

The agency must submit the Request for Voucher Approval form and other required information to the OAG within 10 business days of the agency's receipt of a correct and complete invoice from the outside counsel.

Once the Request for Voucher Approval form and other information are received and reviewed by the OAG, the invoice(s), or a portion thereof, will either be approved or rejected. If approved, the OAG will issue a Voucher Approval to the agency. The agency may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the invoice. Agencies should use Comptroller Code 7258 when entering payment information into USAS. Once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If an invoice is rejected, or if the OAG has questions regarding an invoice, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with the outside counsel.

Administrative Fee. Pursuant to Subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of invoices. The fee is non-refundable and outside counsel may not charge or seek reimbursement from the agency for the fee.

The administrative fee is due to the OAG on the date that the outside counsel submits to the agency its first invoice after the adoption date of the administrative rules. Any invoice submitted to the OAG for review after the effective date of the administrative rules will be deemed ineligible for payment until the outside counsel submits the requisite administrative fee to the OAG. For outside counsel contracts that cross the state's fiscal biennium(s), separate administrative fees are due to the OAG for every fiscal biennium covered under the term of the contract. *Please note that an administrative fee is not due for each invoice submitted.*

The OAG has granted an limited exemption from to the administrative fee and invoice review to university systems and institutions of higher education regarding certain outside counsel that provide legal services under an OAG approved outside counsel contract that is solely related to the filing, management, and/or enforcement of system or institution patents, trademarks, and/or copyrights. More information on the limited exemption is found on the OAG's website.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	Administrative Fee
Less than $2,000.00, but more than $0.00	$100.00
Equal to or greater than $2,000.00 but less than $10,000.00	$200.00
Equal to or greater than $10,000.00 but less than $50,000.00	$500.00
Equal to or greater than $50,000.00 but less than $150,000.00	$1,000.00
Equal to or greater than $150,000.00 but less than $1,000,000.00	$1,500.00
Equal to or greater than $1,000,000.00	$2,000.00

If the outside counsel contract is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, the outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee.

Outside counsel will submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Amending an Outside Counsel Contract. Any change to the outside counsel contract must be supported by an amendment. Any amendment to an existing outside counsel contract must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment that is signed by the agency and outside counsel. Two amendment templates that may be used are posted on the OAG's website.

Reasons to amend an existing outside counsel contract include increasing the contract cap amount or expanding the scope of legal services. The amendment and any supporting documentation should be sent to the following e-mail address: **general.counsel@texasattorneygeneral.gov.**

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's General Counsel Division. The OAG's website may be updated from time to time with additional information, please consider periodically reviewing that resources. Thank you for your attention to these important matters.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

general.counsel@texasattorneygeneral.gov

The Request for Voucher Approval:

OCCInvoice@texasattorneygeneral.gov

Mail may be sent to:
Outside Counsel Contracts
Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:
Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to **James Burkhart, Outside Counsel Contract Coordinator,** General Counsel Division – Telephone Number (512) 475-4291.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Memorandum

To: State Agencies, University Systems, and Institutions of Higher Education

From: Office of the Attorney General—General Counsel Division

Date: December 9, 2016

Re: Outside Counsel Contract Rules and Templates

Pursuant to subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General ("OAG") has adopted administrative rules related to outside legal counsel contracts of state agencies, university systems, and institutions of higher education (individually "agency" and collectively "agencies"). In light of recent changes made to the processes and procedures governing these contracts, the OAG is taking this opportunity to inform agencies of these updates and direct agencies to visit the OAG's website[1] to access the revised forms and templates.

New Policies and Procedures

Request to Retain Outside Legal Counsel. The Attorney General serves as the state's legal counsel; therefore, the OAG serves as legal counsel to all agencies. Agencies may not retain or utilize services provided by outside counsel without first receiving authorization and approval from the OAG. If an agency requires legal services from any outside counsel whatsoever, regardless of the source of funds that would be used to pay for such legal services or the party engaging such counsel, it must first electronically submit to the OAG through DocuSign a Request to Retain Outside Counsel ("RtR") and a proposed Outside Counsel Contract ("OCC").[2] Any questions regarding the RtR and OCC DocuSign process should be sent to the following e-mail address:

general.counsel@oag.texas.gov.

Upon receipt of the electronic RtR and OCC documents, the OAG will review them to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the electronic documents, the OAG will process the RtR and OCC documents or notify the agency in writing that its request has been denied, or that additional information is required to make a decision.

[1] www.texasattorneygeneral.gov/agency/publications

[2] Currently available at: https://na2.docusign.net/member/PowerFormSigning.aspx?PowerFormId=0834844b-35cc-4867-ba31-1277dc86a5d8. Please review the OAG's how-to information sheet for more information on this electronic submission process.

New policies governing:

Requests to Retain Outside Counsel

a. Designation of Responsible Attorney

Agencies must designate a responsible attorney employed by or representing the agency to handle all matters and correspondence with the OAG. The designated attorney must be familiar with all aspects of the RtR and maintain familiarization with any resulting OCC throughout the life of the contract to avoid any delay in processing the RtR and maintaining the contract. Agencies must ensure the contact information for a designated attorney is updated as necessary throughout the duration of the OCC.

b. Requirement for System-Wide Contracts for Universities

University systems and institutions of higher education may no longer submit on behalf of the system's or institution's individual member schools separate RtRs involving the same or similar legal services provided by the same outside counsel attorney or outside counsel firm. For example, a system may not submit a RtR for two of its member universities, (*x*) university and (*y*) university, for the same or similar legal services to be provided by the same outside counsel or outside counsel firm. Instead, all RtRs submitted by a system must contain the system as the contracting party and include the entire amount of the proposed limitation of liability applicable to both (*x*) university and (*y*) university. Legal services to be provided by outside counsel under a system OCC, whether immigration, intellectual property, real estate, etc., must be applicable to all of system's universities to which the services will pertain—in this example, both (*x*) university and (*y*) university.

c. Start and end dates for Outside Counsel Contracts

Unless OAG determines that compelling circumstances exist, the requested start date for an OCC must not be earlier than the first day of the calendar month in which the RtR is submitted for OAG review. Also, except for OCCs involving litigation legal services, OCCs should terminate no later than the end of the fiscal biennium for which the contract is requested. The term of contracts for litigation legal services may extend beyond the end of the immediate biennium or until the litigation concludes, as determined by the agency in consultation with OAG.

d. Documents that Must Accompany Requests to Retain

Along with the RtR, an agency must attach: (1) an outside counsel's signed conflict disclosure statement; (2) the agency's affirmation statement that it has reviewed the disclosure statement and is satisfied with its choice of outside counsel notwithstanding anything contained in the disclosure statement; and (3) documentation of the eligibility of the requested lead counsel to practice law in the State of Texas, where required, or in the jurisdiction in which the services will be performed. Any RtRs not accompanied by these documents will be rejected, and agencies may be required to submit a new RtR along with the required documents. Outside counsel's disclosure statement must

be dated no more than thirty (30) calendar days earlier than the date on which the RtR is submitted or the date the OAG receives the statement, whichever occurs later.

e. Rules for Scopes of Service in Requests to Retain and Contracts

In the RtR, the proposed scope of services must be narrowly tailored so as to provide the OAG with enough information to make an informed decision about whether the proposed outside counsel representation is appropriate, while also being broad enough to fulfill the agency's objectives through the representation. Failure to narrowly tailor the scope of services will result in a delay in processing the RtR, and could result in the RtR being rejected—which would require the agency to submit a new RtR. Agencies should carefully draft the scope of services in order to obtain the results it desires from the proposed outside counsel representation. Finally, no single RtR may contain a scope of services that permits legal representation across multiple practice areas, unless each is clearly related to the central subject matter of the representation and so described in the proposed scope of services.

f. Deviation from the OAG Contract Template

Although the OAG generally will not approve any deviation from the OCC template, the OAG recognizes that exceptional and compelling circumstances could necessitate such changes in rare cases. As a result, the OAG reserves the right to grant exceptions to this policy if the OAG determines it is in the State's best interest to do so. Because the electronic submission process does not allow for any changes to be made to the OCC template, agencies wishing to deviate from the OAG's OCC template must contact the OAG seeking approval for the specified changes.

Competitive Procurement Process

Unless good cause exists, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel, regardless of the anticipated maximum liability of the OCC. The RFQ must be published in the Electronic State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency's discretion. Because the OAG will not review or approve an agency's RFQ, the agency is not required to provide a copy of the RFQ to the OAG. Likewise, it is up to the respective agency to determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

If an agency would like an exemption from the RFQ process requirements, it must certify in its RtR that good cause or a reasonable justification exists for the exemption. Reasonable justifications include emergency situations or situations involving continuing legal services under a previously approved OCC that were not able to be completed within the term of the previous agreement through no fault of either the agency or outside counsel.

Outside Counsel Disclosure Statement Regarding Conflicts of Interest

As mentioned above, the outside counsel disclosure statements must be attached to the agency's electronic submission of the RtR and must be dated no earlier than thirty (30) days before the date the RtR is submitted or the OAG receives the statement, whichever occurs later. Outside counsel must sign the statement and attest to its completeness and accuracy. The agency must separately affirm it has reviewed the disclosure statement and is satisfied with the choice of the proposed outside counsel notwithstanding anything contained in the disclosure statement.

As a point of clarification, present policy requires that outside counsel disclose any and all conflicts that the entire firm (including any offices located outside the State of Texas) has to any and all agencies of the State of Texas, not merely the agency that is a party to the OCC. That obligation continues throughout the life of the contract. Outside counsel must monitor its conflicts for the duration of its representation and disclose to the agency and OAG any existing or potential conflicts that arise concerning the agency, OAG, or the State of Texas.

The OAG will not modify, alter, waive, or allow agencies to waive this disclosure requirement absent exceptional and compelling circumstances unique to the specific law firm or representation sought.

Administrative Fee

Pursuant to subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of invoices. The fee is non-refundable and is due each fiscal biennium. Outside counsel may not charge or seek reimbursement from the agency for the fee.

The initial administrative fee is due to the OAG within thirty (30) calendar days of the date the proposed OCC is approved by the OAG and returned to the agency. If outside counsel has not submitted the required administrative fee within that time, the OAG's approval will be withdrawn, and the OCC will be rendered void. Any invoice submitted to the OAG for review prior to the receipt of the administrative fee will be deemed ineligible for payment until outside counsel submits the requisite administrative fee to the OAG. For OCCs that cross the State's fiscal biennium, separate administrative fees are due to the OAG on September 1 of each subsequent biennium covered by the term of the contract. *Please note that an administrative fee is not due for each invoice submitted.*

The OAG has granted a limited exemption from the administrative fee and invoice review to university systems and institutions of higher education regarding certain legal services that are solely related to the prosecution and management of system or institution intellectual property, which includes patents, trademarks, and copyrights. This limited exemption does not apply to the enforcement of intellectual property rights—including litigation—or corporate legal services relating to the monetization of intellectual property. The OAG may rescind this limited exemption at any time. If the OAG decides to conduct periodic testing of invoices under an OCC that qualified for this limited exemption, the exemption will be deemed rescinded and the applicable non-refundable administrative fee is immediately due upon notice by the OAG that testing will occur.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	**Administrative Fee**
Less than $2,000.00, but more than $0.00	$100.00
Equal to or greater than $2,000.00 but less than $10,000.00	$200.00
Equal to or greater than $10,000.00 but less than $50,000.00	$500.00
Equal to or greater than $50,000.00 but less than $150,000.00	$1,000.00
Equal to or greater than $150,000.00 but less than $1,000,000.00	$1,500.00
Equal to or greater than $1,000,000.00	$2,000.00

Please note that no administrative fee is due on a contract with a maximum liability of $0.00.

If the OCC is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee within thirty (30) calendar days of the date the amendment is approved by the OAG and returned to the agency.

Outside counsel must submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Invoices for Legal Services and Expenses

Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the OCC and the OAG's administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel invoice in accordance with the administrative rules, it must seek approval from the OAG to pay the invoice.

When an agency determines that an invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval, which is available on the OAG's website.[3] The completed Request for Voucher Approval, a copy of the subject invoice, and all other information required to be submitted by the administrative rules should be sent to the following e-mail address:

OCCInvoice@oag.texas.gov.

[3] https://www.texasattorneygeneral.gov/files/agency/voucher_approval_request_word.doc

Note that an agency should submit one Request for Voucher Approval form per billing period per contract, but one request form may be used for multiple invoices from the same billing period. Also note that all invoices within one billing period must be submitted together on a per-contract basis. Separate invoices or separate Requests for Voucher Approval that cover the same time period as other invoices and Requests for Voucher Approval, for the same contract, will be rejected as incomplete, and may result in an invoice not being approved for payment.

Outside Counsel must submit the invoice to the agency for review within one calendar month from the end of the relevant billing period covered by the invoice. The agency must submit the Request for Voucher Approval form and other required information to the OAG within ten (10) business days of the agency's receipt of a correct and complete invoice from the outside counsel. Outside counsel's failure to timely submit each invoice constitutes a breach of the outside counsel contract. Failure to timely submit invoices to OAG for review may result in OAG declining to approve payment of the invoice, unless OAG determines that good cause exists for the delay.

Once the Request for Voucher Approval form and other information are received and reviewed by the OAG, the invoice(s), or a portion thereof, will either be approved or rejected, or the agency will be notified that more information is required. If approved, the OAG will issue a Voucher Approval to the agency. The agency may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the invoice. Agencies should use Comptroller Code 7258 when entering payment information into USAS. Once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If an invoice is rejected, or if the OAG has questions regarding an invoice, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with outside counsel.

Policies and Procedures Remaining In Force

Obtaining the OAG's Approval of the Outside Counsel Contract

As described above, if an agency determines that a change to the OCC template is required in a particular extraordinary instance, the agency must contact the OAG; the electronic submission process does not allow for any changes to be made to the OCC template.

Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with the OAG's contract template.

When completing the electronic RtR, please be mindful of the following:

Total Liability to Outside Counsel—The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the limitation of liability amount.
- All amounts paid for expenses under a contract must count toward the limitation of liability specified in that contract, regardless of whether outside counsel was reimbursed for said expenses or whether such expenses were paid by the agency directly.
- Under no circumstances will expenses or fees relating to the representation be exempted from the limitation of liability.

Contract Term—The start date and end date of the contract term.

- In most cases, the contract term should end on or before August 31st of a biennium.
- The start of the contract term may be no earlier than the first day of the month in which the OAG received the RtR.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, at a date beyond the biennium in which the contract is executed. For example, if the contract involves litigation that has an indiscernible duration, it is acceptable to use a date such as "8/31/2030" or "8/31/2040" or similar dates to account for the uncertainty.

Addendum B to the Contract:

Timekeeper Rates—Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed $525/hour, while hourly rates for paralegals shall not exceed $225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns. Billing for administrative support is not allowed under Section 5.5 of the OCC.
- "Not to exceed"—Agencies that wish to use hourly rates to identify an entire classification of employees must now use a "not to exceed" rate. For example, such a rate would appear as "Partners' rates shall not exceed $300/hr." If, however, the agency wants to ensure that certain individuals are providing the legal services, naming each individual and their specific hourly rate may be preferred. An example of identifying a particular individual, the individual's classification, and the individual's hourly rate would be "Susan Smith, Partner, not to exceed $250/hr."

Fixed Fee or Fee Schedule for Projects or Matters—Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be appropriately billed by a fixed fee per project. An example of a fixed fee per project would be "H-1B Visa Petition is $900." In the event a proposed outside counsel contract involves both fixed fee and hourly rates, an agency must draft and upload a new Addendum B that includes language specifically directing

when either the fixed fee or hourly rate ranges will be used. For example, under the previous example, a contract involving both fixed fees for H-1B Visa Petitions and hourly rates for other services would state "Preparation of H-1B Visa Petition is $900. All other services are governed by the identified hourly rates."

Billing Period—The billing period is the interval specified in the contract, which determines the frequency outside counsel will submit invoices to the agency. The agency and outside counsel will determine the billing period for a particular contract. For most contracts, the billing period will likely be monthly. Outside counsel must submit invoices timely. Any untimely invoices will delay processing and may constitute a breach of the contract, which could result in an invoice being disapproved for payment. Agencies likewise must review and forward invoices to the OAG in a timely manner. As noted below, agencies must submit invoices to the OAG within ten (10) business days of receiving them.

Travel Rate—The agency and outside counsel are permitted, but not required, to pay for time spent traveling to or from a place where legal services are to be provided to agency by setting hourly travel rates. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC. OAG does not consider it a best practice for attorneys to provide legal services while traveling; however, if an attorney is providing legal services while traveling, the attorney may charge the standard hourly rate for the time spent providing those legal services.

Contract Number—The OAG establishes a contract number for each OCC. An agency may establish its own contract number in addition to the OAG's contract number; however, an agency must note the OAG contract number in all correspondence with the OAG.

Texas Law License—An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC requires outside counsel to provide legal services and advice on Texas law, then a Texas-licensed attorney must be utilized and named as lead counsel in Addendum B of the OCC. A law firm with no Texas-licensed attorneys will not be authorized to provide legal services and advice concerning Texas law. Only in limited circumstances will the OAG approve an outside counsel firm with no attorneys licensed in Texas, such as when the scope of legal services to be performed is strictly limited to federal law practice.

Expenses

If outside counsel bills for allowable expenses, copies of actual, itemized receipts must be submitted. The following are examples of expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare or premium or preferred benefits related to airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Amending an Outside Counsel Contract

Any change to an executed and OAG-approved OCC must be supported by a written amendment. Any amendment to an existing OCC must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment that is signed by the agency and outside counsel. A fillable electronic amendment template is available on OAG's website.[4]

Reasons to amend an existing outside counsel contract include increasing the limitation of liability amount or expanding the scope of legal services. If the limitation of liability amount is being increased, the agency should enclose a proper justification in its e-mail requesting the increase. The amendment and any supporting documentation should be submitted electronically through the fillable template on the OAG's website or, if necessary, sent to the following e-mail address:

general.counsel@oag.texas.gov.

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's General Counsel Division. The OAG's website may be updated from time to time with additional information. Please consider periodically reviewing that resource. Thank you for your attention to these important matters.

[4] https://na2.docusign.net/Member/PowerFormSigning.aspx?PowerFormId=939e7086-75bf-4288-85db-6a0191f554c3/.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

general.counsel@oag.texas.gov

The Request for Voucher Approval:

OCCInvoice@oag.texas.gov

Mail may be sent to:
Outside Counsel Contracts
Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:
Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to **James Burkhart, Outside Counsel Contract Coordinator,** General Counsel Division—Telephone Number (512) 475-4291.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Memorandum

To: State Agencies, University Systems, Institutions of Higher Education and Prospective Outside Counsel for any of the aforementioned

From: Office of the Attorney General—Financial Litigation & Charitable Trusts Division

Date: July 3, 2019

Re: Outside Counsel Contract Rules and Templates

Pursuant to subsection 402.0212(f) of the Texas Government Code, the Office of the Attorney General ("OAG") has adopted administrative rules related to outside legal counsel contracts of state agencies, university systems, and institutions of higher education (individually "agency" and collectively "agencies"). In light of recent changes made to the processes and procedures governing these contracts, the OAG is taking this opportunity to inform agencies of these updates and direct agencies to visit the OAG's website[1] to access the revised forms and templates. Please note that the guidance in this letter updates and supersedes the previously issued Letter to State Agencies dated December 9, 2016.

New Policies and Procedures

Request to Retain Outside Legal Counsel. The Attorney General serves as the state's legal counsel; therefore, the OAG serves as legal counsel to all agencies. Agencies may not retain or utilize services provided by outside counsel without first receiving authorization and approval from the OAG. If an agency requires legal services from any outside counsel whatsoever, regardless of the source of funds that would be used to pay for such legal services or the party engaging such counsel, it must first electronically submit to the OAG a Request to Retain Outside Counsel ("RtR") through the link available on the OAG's website.[2] Any questions regarding the Outside Counsel Contract ("OCC") process should be sent to the following e-mail address:

FLDContracts@oag.texas.gov.

Upon receipt, the OAG will review the RtR to determine whether the requested legal services should be provided by the OAG or whether retaining outside counsel would be in the best interests of the state. Within ten (10) business days after receiving the electronic documents, the OAG will

[1] https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

[2] Click on the "Request to Retain Outside Counsel" link available at https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

either process the RtR and OCC documents or notify the agency in writing if its request has been denied or if additional information is required to make a decision.

Requests to Retain Outside Counsel

a. Designation of Agency Contact and Responsible Attorney

Agencies must designate an individual employed by the agency to act as the agency contact and handle all matters and correspondence with the OAG related to the RtR and any resulting contract. To the extent the agency contact is not an attorney, the agency must also designate a responsible attorney, employed by the agency's Office of General Counsel, or otherwise representing the agency, who must be familiar with all aspects of the RtR and maintain familiarization with any resulting OCC throughout the life of the contract to avoid any delay in processing the RtR and maintaining the contract. Agencies must ensure the contact information for the designated agency contact and/or the responsible attorney is updated as necessary throughout the duration of the OCC.

b. Requirement for System-Wide Contracts for Universities

University systems and institutions of higher education may not submit on behalf of the system's or institution's individual member schools separate RtRs involving the same or similar legal services provided by the same outside counsel attorney or outside counsel firm. For example, a system may not submit a RtR for two of its member universities, (*x*) university and (*y*) university, for the same or similar legal services to be provided by the same outside counsel or outside counsel firm. Instead, all RtRs submitted by a system must identify the system as the contracting party and include the entire amount of the proposed limitation of liability applicable to both (*x*) university and (*y*) university. Legal services to be provided by outside counsel under a system OCC, whether immigration, intellectual property, real estate, etc., must be applicable to all of system's universities to which the services will pertain—in this example, both (*x*) university and (*y*) university.

c. Start and end dates for Outside Counsel Contracts

Unless OAG determines that compelling circumstances exist, the requested start date for an OCC must not be earlier than the first day of the calendar month in which the RtR is submitted for OAG review. Also, except for OCCs involving litigation legal services, OCCs should terminate no later than the end of the fiscal biennium for which the contract is requested. The term of contracts for litigation legal services may extend beyond the end of the immediate biennium or until the litigation concludes, as determined by the agency in consultation with OAG.

d. Documents that Must Accompany Requests to Retain

Along with the RtR, an agency must attach: (1) an outside counsel's signed conflict disclosure statement; (2) the agency's affirmation statement that it has reviewed the disclosure statement and is satisfied with its choice of outside counsel notwithstanding anything contained in the disclosure

statement; and (3) documentation of the eligibility of the requested lead counsel to practice law in the State of Texas, where required, or in the jurisdiction in which the services will be performed. Any RtRs not accompanied by these documents will be rejected, and agencies may be required to resubmit the RtR along with all required documents. Outside counsel's disclosure statement must be dated no more than thirty (30) calendar days earlier than the date on which the RtR is submitted or the date the OAG receives the statement, whichever occurs later.

e. Guidance for Scopes of Service in Requests to Retain and Contracts

In the RtR, the proposed scope of services must be narrowly tailored so as to provide the OAG with enough information to make an informed decision about whether the proposed outside counsel representation is appropriate, while also being broad enough to fulfill the agency's objectives through the representation. Failure to narrowly tailor the scope of services will result in a delay in processing the RtR, and could result in the RtR being rejected—which would require the agency to submit a new RtR. Agencies should carefully draft the scope of services in order to obtain the results it desires from the proposed outside counsel representation. Finally, no single RtR may contain a scope of services that permits legal representation across multiple practice areas, unless each is clearly related to the central subject matter of the representation and so described in the proposed scope of services.

f. Deviation from the OAG Contract Template

Although the OAG generally will not approve any deviation from the OCC template, the OAG recognizes that exceptional and compelling circumstances could necessitate such changes in rare cases. As a result, the OAG reserves the right to grant exceptions to this policy if the OAG determines it is in the State's best interest to do so. Because the electronic submission process does not allow for any changes to be made to the OCC template, agencies wishing to deviate from the OAG's OCC template must contact the OAG directly to seek approval for the specified changes.

Competitive Procurement Process

Unless good cause exists, an agency is required to publish a Request for Qualifications ("RFQ") before selecting outside counsel, regardless of the anticipated maximum liability of the OCC. The RFQ must be published in the Electronic State Business Daily for a minimum of thirty (30) calendar days. The RFQ may also be placed in other publications, such as the Texas Register, at the agency's discretion. Because the OAG will not review or approve an agency's RFQ, the agency is not required to provide a copy of the RFQ to the OAG. Likewise, it is up to the respective agency to determine how long a response to a published RFQ will be valid, consistent with RFQ limitations.

If an agency would like an exemption from the RFQ process requirements, it must certify in its RtR that good cause or a reasonable justification exists for the exemption. Reasonable justifications include emergency situations or situations involving continuing legal services under a previously approved OCC that were not able to be completed within the term of the previous agreement through no fault of either the agency or outside counsel. The OAG is not responsible for determining what amounts to good cause or a reasonable justification. Such determinations

must be made independently by the agency in consultation with agency's internal legal counsel and/or agency leadership.

Outside Counsel Disclosure Statement Regarding Conflicts of Interest

As mentioned above, the outside counsel disclosure statements must be attached to the agency's electronic submission of the RtR and must be dated no earlier than thirty (30) days before the date the RtR is submitted or the OAG receives the statement, whichever occurs later. Outside counsel must sign the statement and attest to its completeness and accuracy. The agency must separately affirm it has reviewed the disclosure statement and is satisfied with the choice of the proposed outside counsel notwithstanding anything contained in the disclosure statement.

As a point of clarification, present policy requires that outside counsel disclose any and all conflicts that the entire firm (including any offices located outside the State of Texas) has to any and all agencies of the State of Texas, not merely the agency that is a party to the OCC. That obligation continues throughout the life of the contract. Outside counsel must monitor its conflicts for the duration of its representation and disclose to the agency and OAG any existing or potential conflicts that arise concerning the agency, OAG, or the State of Texas.

The OAG will not modify, alter, waive, or allow agencies to waive this disclosure requirement absent exceptional and compelling circumstances unique to the specific law firm or representation sought.

Invoices for Legal Services and Expenses

Outside counsel will prepare and submit to the agency correct and complete "Invoices" and "Invoice Summaries" for legal services and expenses in accordance with the OCC and the OAG's administrative rules. Invoices cannot be paid by the agency, regardless of the source of funds used, without the prior approval of the OAG. Therefore, after the agency reviews and approves an outside counsel Invoice in accordance with the Outside Counsel Contract and the administrative rules, it must seek approval from the OAG to pay the Invoice.

When an agency determines that an Invoice, or a portion thereof, should be paid, the agency must complete a Request for Voucher Approval, which is available on the OAG's website.[3] The completed Request for Voucher Approval, a copy of the subject Invoice(s), and all other information required to be submitted by the administrative rules make up one "Voucher Packet".

An agency should submit one Voucher Packet per billing period per contract. However, one Voucher Packet may include multiple Invoices from the same billing period. Multiple Voucher Packets covering the same time period as other Voucher Packets for the same contract will be rejected as incomplete, and may result in an Invoice not being approved for payment.

Voucher Packets should be sent to the following e-mail address: **OCCInvoice@oag.texas.gov**.

[3] Click on the "Request for Voucher Approval" link available at https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

Outside counsel must submit Invoice(s) to the agency for review within one calendar month from the end of the relevant billing period covered by the Invoice. Pursuant to Section 402.0212 of the Texas Government Code, the agency must submit Invoices and the corresponding Request for Voucher Approval to the OAG within twenty-five (25) days of the agency's receipt of a correct and complete Invoice from the outside counsel. The 25-day-period begins once the last, timely, correct and complete Invoice for the relevant billing period has been received by the agency. "Correct and complete Invoice" is defined in Texas Administrative Code Rule §57.6(b).

Outside counsel's failure to timely submit each Invoice constitutes a breach of the outside counsel contract. Failure to timely submit a Voucher Packet to OAG for review may result in OAG declining to approve payment of the Invoice(s) included in the Voucher Packet, unless OAG determines that good cause exists for the delay. *No late Voucher Packets or Voucher Packets that include late Invoices will be reviewed by the OAG unless a reasonable justification for the delay has been provided.*

Once the Voucher Packet is received and reviewed by the OAG, the Invoice(s), or a portion thereof, will either be approved or rejected, or the agency will be notified that more information is required. If approved, the OAG will issue a Voucher Approval to the agency. The agency may then enter the payment information into the Uniform Statewide Accounting System ("USAS") or, if permitted, otherwise proceed to pay the Invoice. Agencies should use Comptroller Code 7258 when entering payment information into USAS. Once an agency receives a Voucher Approval from the OAG, payment can occur when the agency enters the payment information and approves the documentation in USAS.

If any Invoices under a Voucher Packet are rejected, or if the OAG has questions regarding a Voucher Packet, it will contact the agency to attempt to resolve the issue. The OAG will not discuss invoice issues with outside counsel.

Administrative Fee

Pursuant to subsection 402.0212(c) of the Texas Government Code, outside counsel must pay an administrative fee to the OAG for the review of Invoices. The fee is non-refundable and is due each fiscal biennium. Outside counsel may not charge or seek reimbursement from the agency for the fee.

The initial administrative fee is due to the OAG within thirty (30) calendar days of the date the proposed OCC has received final approval by the OAG and returned to the agency. If outside counsel has not submitted the required administrative fee within that time, the OAG's approval may be withdrawn, rendering the OCC void. Any Invoice submitted to the OAG for review as part of a Voucher Packet prior to the receipt of the administrative fee will be deemed ineligible for payment until outside counsel submits the requisite administrative fee to the OAG. For OCCs that cross the State's fiscal biennium, separate administrative fees are due to the OAG on September 1 of each subsequent biennium covered by the term of the contract. *Please note that an administrative fee is not due for each Invoice submitted.*

The OAG has granted a limited exemption from the administrative fee and Invoice review to university systems and institutions of higher education regarding certain legal services that are solely related to the prosecution and management of system or institution intellectual property, which includes patents, trademarks, and copyrights. This limited exemption does not apply to the enforcement of intellectual property rights—including litigation—or corporate legal services relating to the monetization of intellectual property. The OAG may rescind this limited exemption at any time. If the OAG decides to conduct periodic testing of Invoices under an OCC that qualified for this limited exemption, the exemption will be deemed rescinded and the applicable non-refundable administrative fee is immediately due upon notice by the OAG that testing will occur.

The administrative fee is set on a sliding scale, based on the contract cap amount, as follows:

Limitation of Liability Amount	**Administrative Fee**
Less than $2,000.00, but more than $0.00	$100.00
Equal to or greater than $2,000.00 but less than $10,000.00	$200.00
Equal to or greater than $10,000.00 but less than $50,000.00	$500.00
Equal to or greater than $50,000.00 but less than $150,000.00	$1,000.00
Equal to or greater than $150,000.00 but less than $1,000,000.00	$1,500.00
Equal to or greater than $1,000,000.00	$2,000.00

Please note that no administrative fee is due on a contract with a maximum liability of $0.00.

If the OCC is amended and the original limitation of liability amount is increased to an amount that would require a higher fee, outside counsel shall pay the difference between the original lesser fee, if already paid, and the new higher fee within thirty (30) calendar days of the date the amendment is approved by the OAG and returned to the agency.

Outside counsel must submit the administrative fee to the following address:

Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Checks or money orders must be made payable to the "Office of the Attorney General" and reference the OCC Number.

Obtaining the OAG's Approval of the Outside Counsel Contract

As described above, if an agency determines that a change to the OCC template is required in a particular extraordinary instance, the agency must contact the OAG; the electronic submission process does not allow for any changes to be made to the OCC template.

Agencies should not sign engagement letters with any potential outside counsel because such letters do not comply with applicable laws, rules, and procedures, and are not compatible with the OAG's contract template.

When completing the electronic RtR, please be mindful of the following:

Total Liability to Outside Counsel—The limitation of liability amount specified in the contract.

- Legal service fees and expenses cannot exceed the limitation of liability amount.
- All amounts paid to outside counsel, regardless of source, cannot exceed the limitation of liability amount.
- All amounts paid for expenses under a contract must count toward the limitation of liability specified in that contract, regardless of whether outside counsel was reimbursed for said expenses or whether such expenses were paid by the agency directly.
- Under no circumstances will expenses or fees relating to the representation be exempted from the limitation of liability.

Contract Term—The start date and end date of the contract term.

- In most cases, the contract term should end on or before August 31st of a biennium.
- The start of the contract term may be no earlier than the first day of the month in which the OAG received the RtR.
- Contracts for litigation legal services may be allowed to end, regardless of the biennium, at a date beyond the biennium in which the contract is executed. For example, if the contract involves litigation that has an indiscernible duration, it is acceptable to use a date such as "8/31/2030" or "8/31/2040" or similar dates to account for the uncertainty.

Addendum B to the Contract:

Timekeeper Rates—Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed $525/hour, while hourly rates for non-attorney legal work (limited to paralegals, legal assistants, and other timekeepers performing similar legal work) shall not exceed $225/hour.

- Outside counsel may not bill for administrative staff, law clerks, or interns. Billing for administrative support is not allowed under Section 5.5 of the OCC.
- "Not to exceed"—Agencies that wish to use hourly rates to identify an entire classification of employees must now use a "not to exceed" rate. For example, such a rate would appear as "Partners' rates shall not exceed $300/hr." If, however, the agency wants to ensure that certain individuals are providing the legal services, naming each individual and their specific hourly rate may be preferred. An example of identifying a particular individual, the individual's classification, and the individual's hourly rate would be "Susan Smith, Partner, not to exceed $250/hr."

Fixed Fee or Fee Schedule for Projects or Matters—Instead of using hourly rates, some legal services, such as immigration, bond, or intellectual property work, may be appropriately billed by a fixed fee per project. An example of a fixed fee per project would be "H-1B Visa Petition is $900." In the event a proposed outside counsel contract involves both fixed fee and hourly rates, an agency must draft and upload a new Addendum B that includes language specifically directing when either the fixed fee or hourly rate ranges will be used. For example, under the previous example, a contract involving both fixed fees for H-1B Visa Petitions and hourly rates for other services would state "Preparation of H-1B Visa Petition is $900. All other services are governed by the identified hourly rates."

Please note, fixed fees should be treated as set amounts, rather than as not-to-exceed limitations. For any Invoices with amounts deviating from the fees established by the Outside Counsel Contract, the reason(s) for the deviation(s) must be clearly identified on the Invoice itself. Otherwise, the OAG will be unable to approve payment of the Invoice.

If a subcontractor is providing legal services at a fixed fee, a statement must be provided to the OAG certifying that the time spent on the flat fee work was, at minimum, comparable to what would have been spent had the firm been billing at the maximum hourly rate allowed under Addendum B of the Outside Counsel Contract.

Billing Period—The billing period is the interval that determines the frequency outside counsel will submit Invoices to the agency. The agency and outside counsel will determine and specify the billing period in each specific contract. For most contracts, the billing period will likely be monthly - beginning with the first day of the calendar month and ending with the last day of the calendar month. Additionally, as noted above, outside counsel must submit the Invoice(s) to the agency within one calendar month from the end of the relevant billing period covered by the Invoice. Any untimely invoice submissions by Outside counsel will delay processing and may constitute a breach of the contract, which could result in an Invoice being disapproved for payment. Agencies likewise must review Invoices and submit Voucher Packets to the OAG in a timely manner.

Travel— By setting hourly travel rates in a contract, the agency and outside counsel are permitted, but not required, to pay for time spent traveling to or from a place where legal services are to be provided to the agency. Note that an attorney's travel rate may not exceed half of that attorney's standard hourly rate under the OCC. OAG does not consider it a best practice for attorneys to provide legal services while traveling; however, if an attorney is providing legal services while traveling, the attorney may charge the standard hourly rate for the time spent providing those legal services.

Additionally, any attorneys or other timekeepers who are traveling for work under the contract must either be named or fall under one of the timekeeper classifications in Addendum B of the contract. This applies even if the firm is typically only providing work under a fixed fee schedule.

Contract Number—The OAG establishes a contract number for each OCC. An agency may establish its own contract number in addition to the OAG's contract number; however, an agency must note the OAG contract number in all correspondence with the OAG.

Texas Law License—An attorney must be licensed by the State Bar of Texas in order to provide legal services and advice concerning Texas law, regardless of whether the attorney is actually located in Texas. If an OCC requires outside counsel to provide legal services and advice on Texas law, then a Texas-licensed attorney must be utilized and named as lead counsel in Addendum B of the OCC. A law firm with no Texas-licensed attorneys will not be authorized to provide legal services and advice concerning Texas law. Only in limited circumstances will the OAG approve an outside counsel firm with no attorneys licensed in Texas, such as when the scope of legal services to be performed is strictly limited to federal law practice.

Expenses

If outside counsel bills for allowable expenses, copies of actual, itemized receipts must be submitted to the Agency. The following are examples of expenses that are not reimbursable: gratuity; alcohol; non-coach class airfare or premium or preferred benefits related to airfare; routine copying charges; fax charges; routine postage; office supplies; telephone charges; local travel (within 20-mile radius of office), including mileage, parking, and tolls; all delivery services incurred by internal staff; air-conditioning; electricity or other utilities; and internet charges.

Pursuant to Texas Government Code §402.0212, the OAG shall review outside counsel's Invoices only to determine whether the legal services for which the agency is billed were performed within the term of the contract and are within the scope of the legal services authorized by the contract and are therefore eligible for payment. Agencies shall submit to the OAG a statement with each Invoice confirming the agency-approved amounts to be paid to outside counsel for legal services and expenses allowed under the contract and the amount of any expenses allowed under the contract which were paid for directly by the agency or any party other than outside counsel.

Pursuant to Texas Government Code §402.0212, the agency shall also include with any Voucher Packet (and associated Invoices) submitted to OAG for approval, a written certification, as provided by the Request for Voucher Approval, that the legal services for which the agency is billed were performed within the term of the contract, are within the scope of the legal services authorized by the contract and are reasonably necessary to fulfill the purpose of the contract.

Amending an Outside Counsel Contract

Any change to an executed and OAG-approved OCC must be supported by a written amendment. Any amendment to an existing OCC must also be approved by the OAG. An agency wishing to amend a contract must first submit to the OAG a completed amendment, using the fillable electronic amendment template is available on OAG's website.[4]

Reasons to amend an existing outside counsel contract include increasing the limitation of liability amount or expanding the scope of legal services. If the limitation of liability amount is being increased, the agency should enclose a proper justification (for example, if at least 75% of the

[4] Click on the "Amendment to Outside Counsel Contract" link available at https://www.texasattorneygeneral.gov/divisions/financial-litigation-and-charitable-trusts/outside-counsel-contracts

current limitation of liability has been spent) in its e-mail requesting the increase. The amendment and any supporting documentation should be submitted electronically through the fillable template on the OAG's website.

Should you have any questions regarding these matters, please do not hesitate to contact the OAG's Financial Litigation and Charitable Trusts Division. The OAG's website may be updated from time to time with additional information. Please periodically review that resource. Thank you for your attention to these important matters.

Important Addresses and Contact Information

The Request to Retain Outside Counsel and the Outside Counsel Contract:

FLDContracts@oag.texas.gov

The Request for Voucher Approval:

OCCInvoice@oag.texas.gov

Mail may be sent to:
Outside Counsel Contracts
Office of the Attorney General
Financial Litigation and Charitable Trusts Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

Outside Counsel must submit administrative fees to:
Outside Counsel Invoice
Office of the Attorney General
P.O. Box 13175
Austin, TX 78711-3175

Questions may be directed to **Mari Gomez, Outside Counsel Contract Coordinator,** Financial Litigation and Charitable Trusts Division—Telephone Number (512) 475-1849.

ENTERGY TEXAS, INC.
PUBLIC UTILITY COMMISSION OF TEXAS
DOCKET NO. 53719

Response of: Entergy Texas, Inc.
to the First Set of Data Requests
of Requesting Party: Commission Staff

Prepared By: Kaitlyn Roberts, Tuyen Dang
Sponsoring Witness: Richard E. Lain
Beginning Sequence No. LC2637
Ending Sequence No. LC2637

Question No.: STAFF 1-2 Part No.: Addendum: 1

Question:

RATE-CASE EXPENSES

Please provide the following information for all requested rate-case expenses, whether directly or indirectly incurred. If provided previously, please provide a cross-reference identifying the page number of the filing which contains this information.

Please provide a detailed schedule of, and justification for, each individual whose hourly billing rate is $550 an hour or greater. The schedule should include the vendor's name, individual's name, individual's title, number of hours billed broken out by days, and specific descriptions of work hours. Please calculate the total amount of rate-case expenses that are in excess of $550 per hour.

Response:

Please see the attachment (TP-53719-00PUS001-X002) which provides each individual whose hourly billing rate is $550 an hour or greater. This schedule includes the vendor's name, the individual's name, the individual's title, the billing period, the individual's hourly rate, the hours worked during the billing period, the fees for the billing period, the fees in excess of $550 per hour per month, and the justification for the billing rates. The number of hours billed broken out by days and specific descriptions of work hours are in the invoices provided in ETI's response to RFI Staff 1-1.

Addendum 1:

Please see the attachment (TP-53719-00PUS001-X002_ADD1), which provides each individual whose hourly billing rate is $550 an hour or greater. This schedule includes the vendor's name, the individual's name, the individual's title, the billing period, the individual's hourly rate, the hours worked during the billing period, the fees for the billing period, the fees in excess of $550 per hour per month, and the justification for the billing rates. The number of hours billed broken out by days and specific descriptions of work hours are in the invoices provided in ETI's response to RFI Staff 1-1, Addendum 1.

ETI's Response to RFI Staff 1-2
Rate Case Expenses

Docket No. 49916

Vendor's Name	Individual's Name	Individual's Title	Billing Period	Rate	Hours	Fees	Fees in excess of $550/hr	Justification	Monthly Update
Eversheds	Lino Mendiola	Partner	Apr-19	$635.00	1.90	$1,206.50	$161.50	Refer to Direct Testimony of Meghan Griffiths ("Griffiths Direct") at 24-28.	
Eversheds	Lino Mendiola	Partner	May-19	$635.00	0.80	$508.00	$68.00	Refer to Griffiths Direct at 24-28.	
Eversheds	Lino Mendiola	Partner	Jun-19	$635.00	0.60	$381.00	$51.00	Refer to Griffiths Direct at 24-28.	
Eversheds	Lino Mendiola	Partner	Aug-19	$635.00	0.40	$254.00	$34.00	Refer to Griffiths Direct at 24-28.	
Eversheds	Lino Mendiola	Partner	Sep-19	$635.00	0.50	$317.50	$42.50	Refer to Griffiths Direct at 24-28.	
Eversheds	Lino Mendiola	Partner	Feb-20	$635.00	0.60	$381.00	$51.00	Refer to Griffiths Direct at 24-28.	
Eversheds	Lino Mendiola	Partner	Mar-20	$635.00	1.00	$635.00	$85.00	Refer to Griffiths Direct at 24-28.	
Eversheds	Lino Mendiola	Partner	Apr-20	$635.00	3.00	$1,905.00	$255.00	Refer to Griffiths Direct at 24-28.	

Docket No. 53719

Vendor's Name	Individual's Name	Individual's Title	Billing Period	Rate	Hours	Fees	Fees in excess of $550/hr	Justification
Eversheds	Lino Mendiola	Partner	Jan-22	$710.00	1.60	$1,136.00	$256.00	Refer to Griffiths Direct at 24-28.
Eversheds	Lino Mendiola	Partner	Feb-22	$710.00	1.50	$1,065.00	$240.00	Refer to Griffiths Direct at 24-28.
Eversheds	Lino Mendiola	Partner	Mar-22	$710.00	11.00	$7,810.00	$1,760.00	Refer to Griffiths Direct at 24-28.
Jackson Walker	Meghan Griffiths	Partner	Jan-22	$720.00	1.60	$1,152.00	$272.00	Refer to Griffiths Direct at 47-49.
Jackson Walker	Meghan Griffiths	Partner	Feb-22	$720.00	2.40	$1,728.00	$408.00	Refer to Griffiths Direct at 47-49.
							$3,684.00	

ETI's Response to RFI Staff 1-2
Rate Case Expenses

Docket No. 49916

Vendor's Name	Individual's Name	Individual's Title	Billing Period	Rate	Hours	Fees	Fees in excess of $550/hr	Justification	Monthly Update

Docket No. 53719

Vendor's Name	Individual's Name	Individual's Title	Billing Period	Rate	Hours	Fees	Fees in excess of $550/hr	Justification	
Eversheds	Lino Mendiola	Partner	Apr-22	$710.00	1.00	$710.00	$160.00	Refer to Griffiths Direct at 24-28.	Addendum 1
Eversheds	Lino Mendiola	Partner	May-22	$710.00	14.90	$10,579.00	$2,384.00	Refer to Griffiths Direct at 24-28.	Addendum 1
Eversheds	Lino Mendiola	Partner	Jun-22	$710.00	31.50	$22,365.00	$5,040.00	Refer to Griffiths Direct at 24-28.	Addendum 1
Jackson Walker	M. Griffiths	Partner	Apr-22	$720.00	2.00	$1,440.00	$340.00	Refer to Griffiths Direct at 47-49.	Addendum 1
Jackson Walker	M. Griffiths	Partner	May-22	$720.00	15.60	$11,232.00	$2,652.00	Refer to Griffiths Direct at 47-49.	Addendum 1
Jackson Walker	A. Adams	Associate	May-22	$645.00	7.20	$4,644.00	$684.00	Refer to Griffiths Direct at 47-49.	Addendum 1
Brattle Group	Ann Bulkley-Armour	Principal	Apr-22	$625.00	2.75	$1,718.75	$206.25	Refer to Griffiths Direct at 44.	Addendum 1

FEES IN EXCESS OF $550/HOUR

Docket No. 49916 Vendor's Name	Individual's Nam	Individual'	Billing Per Rate		Hours	Fees	Fees in exces	Redacted Hours	Fees > $550 Per Hour Excluding Redacted Hours
Eversheds	Lino Mendiola	Partner	Apr-19	$635.00	1.90	$1,206.50	$161.50		$161.50
Eversheds	Lino Mendiola	Partner	May-19	$635.00	0.80	$508.00	$68.00		$68.00
Eversheds	Lino Mendiola	Partner	Jun-19	$635.00	0.60	$381.00	$51.00		$51.00
Eversheds	Lino Mendiola	Partner	Aug-19	$635.00	0.40	$254.00	$34.00	0.4	$0.00
Eversheds	Lino Mendiola	Partner	Sep-19	$635.00	0.50	$317.50	$42.50		$42.50
Eversheds	Lino Mendiola	Partner	Feb-20	$635.00	0.60	$381.00	$51.00		$51.00
Eversheds	Lino Mendiola	Partner	Mar-20	$635.00	1.00	$635.00	$85.00		$85.00
Eversheds	Lino Mendiola	Partner	Apr-20	$635.00	3.00	$1,905.00	$255.00	0.5	$212.50
TOTAL EVERSHEDS							**$748.00**	**0.90**	**$671.50**

TOTAL DOCKET NO 49916	**$671.50**

Docket No. 53719 Vendor's Name	Individual's Nam	Individual'	Billing Per Rate		Hours	Fees	Fees in exces	Redacted Hours	Fees > $550 Per Hour Excluding Redacted Hours
Eversheds	Lino Mendiola	Partner	Jan-22	$710.00	1.60	$1,136.00	$256.00		$256.00
Eversheds	Lino Mendiola	Partner	Feb-22	$710.00	1.50	$1,065.00	$240.00		$240.00
Eversheds	Lino Mendiola	Partner	Mar-22	$710.00	11.00	$7,810.00	$1,760.00		$1,760.00
Eversheds	Lino Mendiola	Partner	Apr-22	$710.00	1.00	$710.00	$160.00		$160.00
Eversheds	Lino Mendiola	Partner	May-22	$710.00	14.90	$10,579.00	$2,384.00		$2,384.00
Eversheds	Lino Mendiola	Partner	Jun-22	$710.00	31.50	$22,365.00	$5,040.00		$5,040.00
TOTAL EVERSHEDS							**$9,840.00**		**$9,840.00**
Jackson Walker	Meghan Griffiths	Partner	Jan-22	$720.00	1.60	$1,152.00	$272.00		$272.00
Jackson Walker	Meghan Griffiths	Partner	Feb-22	$720.00	2.40	$1,728.00	$408.00		$408.00
Jackson Walker	M. Griffiths	Partner	Apr-22	$720.00	2.00	$1,440.00	$340.00		$340.00
Jackson Walker	M. Griffiths	Partner	May-22	$720.00	15.60	$11,232.00	$2,652.00		$2,652.00
Jackson Walker	A. Adams	Associate	May-22	$645.00	7.20	$4,644.00	$684.00		$684.00
TOTAL JACKSON WALKER							**$4,356.00**		**$4,356.00**

TOTAL DOCKET NO 53719	**$14,196.00**

TOTAL DISALLOWANCE FOR FEES IN EXCESS OF $550/HOUR	**$14,867.50**

CALCULATION OF DISALLOWANCE FOR REDACTED INVOICES

Docket No. 49916 - Fuel Reconciliation

DWMR Invoice Date		Redacted Amount	Discount Applied		Disallowed Amount
8/14/19					
	JJB	$ 756.00	5%	$	718.20
9/12/19					
	JJB	$ 462.00	5%	$	438.90
	JJB	$ 336.00	5%	$	319.20
TOTAL DWMR				**$**	**1,476.30**

Eversheds Invoice Date		Redacted Hours	Hourly Rate		Disallowed Amount
7/25/19					
	MB	3.0	$ 490.00	$	1,470.00
9/16/19					
	JZ	3.5	$ 410.00	$	1,435.00
	LM	0.4	$ 635.00	$	254.00
10/21/19					
	MB	16.7	$ 490.00	$	8,183.00
	JZ	12.4	$ 410.00	$	5,084.00
4/15/20					
	JZ	1.7	$ 410.00	$	697.00
5/15/20	MB	4.8	$ 490.00	$	2,352.00
	LM	0.5	$ 635.00	$	317.50
TOTAL EVERSHEDS				**$**	**19,792.50**
TOTAL DOCKET NO. 49916				**$**	**21,268.80**

Docket No. 53719 - Rate Case

Eversheds Invoice Date		Redacted Amount	Hourly Rate		Disallowed Amount
6/28/22					
	CG	$ 962.50		$	962.50
TOTAL DOCKET NO. 53719				**$**	**962.50**
TOTAL REDACTION DISALLOWANCE				**$**	**22,231.30**

Deloitte.

Invoice 8002650719

Deloitte & Touche LLP

Date: May 26, 2022

FEIN: 133891517

Billing Address:
ATTN: Ms. Kimberly Fontan
Entergy Texas, Inc.
639 Loyola Avenue
New Orleans LA 70113
USA

For professional services rendered

Fees	$	150,000.00

Billing related to our attestation report over the Summary of Costs Billed by Entergy Services, LLC and Other Entergy Affiliates to Entergy Texas, Inc. in accordance with the Engagement Letter dated May 5, 2022

Total Amount Due (USD)	$	150,000.00

Payment Instructions:

Check Payment Mailing Address:
Deloitte & Touche LLP
PO Box 844708
Dallas TX 75284-4708

Email remittance information to:
deloittepayments@deloitte.com

Please pay by ACH amounts and with CTX, CCD+ or WIRE. Include Invoice numbers/ your company name with payment.

Bank Name: Bank of America

Electronic funds payment details

ABA# and ACH#: 011900571
US WIRE: 026009593
Swift Code : BOFAUS3N
Account Title: DELOITTE & TOUCHE LLP
Account Number: 385015866213

Payment Terms:
Per Contract or Upon Receipt

Billing Office:
701 Poydras Street
Suite 4200
New Orleans LA 70139-4200

Sold to Address:
ENTERGY CORPORATION
639 Loyola Ave
NEW ORLEANS LA 70113-3125

Overnight Mailing Address:
Deloitte & Touche LLP LBX# 844708
1950 N. Stemmons Freeway
Suite 5010
Dallas TX 75207

2016 WL 1179085

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

ENTERGY TEXAS, INC., Appellant

v.

PUBLIC UTILITY COMMISSION OF TEXAS, Office of Public Utility Counsel, and State of Texas Agencies and Institutions of Higher Education, Appellees

NO. 03–14–00706–CV

|

Filed: March 24, 2016

Synopsis

Background: Electric utility brought action against Public Utility Commission to challenge the Commission's final order in a proceeding to determine the expenses that utility could recover for prosecuting a prior base-rate case. The District Court, Travis County, 345th Judicial District, Amy Clark Meachum, J., entered judgment upholding the Public Utility Commission's final order. Utility appealed.

Holdings: The Court of Appeals, David Puryear, J., held that:

[1] Commission properly denied recovery of litigation expenses incurred in pursuit of financially based incentive compensation;

[2] Commission properly selected the "issue-specific" or "proxy" method to quantify the amount of disallowance; and

[3] Commission properly found that electric utility failed to prove depreciation expenses for office equipment were recoverable.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (5)

[1] Electricity ⇦ Operating expenses

Public Utility Commission did not improperly act arbitrarily or engage in ad hoc rulemaking, in rejecting electric utility's request to recover litigation expenses incurred in pursuit of the recovery of financially based incentive compensation in its general base-rate case, even if there had been a few previous dockets in which the Commission purportedly allowed some form of recovery for rate-case expenses incurred in seeking to include financially based incentive compensation in base rates, since those dockets did not establish an established policy requiring the recovery of rate-case expenses to litigate the issue, and the utility took unreasonable "long shot" positions on the incentive-compensation issue in light of clear and consistent precedent to the contrary. Tex. Util. Code Ann. § 36.061.

2 Cases that cite this headnote

[2] Electricity ⇦ Proceedings before commissions

Public Utility Commission's disallowance of electric utility's request to recover litigation expenses incurred in pursuit of the recovery of financially based incentive compensation in its general base-rate case was supported by substantial evidence, including evidence that utility was fully cognizant of Commission precedent disallowing the recovery of financially based incentive compensation, and that the case was the third consecutive docket in four years in which the utility sought, but failed, to obtain authority to charge ratepayers for that type of financially based incentive cost. Tex. Util. Code Ann. § 36.061.

2 Cases that cite this headnote

[3] Electricity ⇦ Operating expenses

Public Utility Commission did not improperly act arbitrarily or engage in ad hoc rulemaking, in selecting the "issue-specific" or "proxy" method to quantify the amount of disallowance attributable to electric utility's "unreasonable" litigation of utility's attempt to recover financially based incentive compensation, which involved reducing the balance of

utility's otherwise reasonably incurred rate-case expenses by the ratio of the disallowed incentive compensation to the total requested rate increase in the underlying base-rate case, even though the Commission had in some other dockets disallowed expenses in the amount of actual expenses associated with the testimony tied to the contested issue, where in the present case the Commission was unable, from the evidence that the utility produced, to determine the full amount of rate-case expenses associated with the financially based incentive-compensation issue. Tex. Util. Code Ann. § 36.061(b)(2).

2 Cases that cite this headnote

[4] **Electricity** ⇨ Proceedings before commissions

Public Utility Commission did not act arbitrarily and capriciously in finding that electric utility failed to meet its burden to prove that its reasonable recoverable expenses in its base-rate case included depreciation expenses for its affiliate's office equipment, where the utility supported its claim primarily with a spreadsheet that did not identify which assets were depreciated or their original costs, how the depreciation was calculated, which employees used the assets, or how the assets were amortized. Tex. Util. Code Ann. § 36.058(b).

[5] **Electricity** ⇨ Judicial review and enforcement

Electric utility waived the argument on appeal that the Public Utility Commission's ultimate finding of fact on the reasonableness of utility's claim to recover office equipment depreciation expenses for its prosecution of a prior base-rate case was not supported by any underlying findings and therefore was reversible, where utility did not raise that argument in its motion for rehearing before the Commission. Tex. Gov't Code Ann. § 2001.141(d); Tex. Util. Code Ann. § 36.058(b).

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT, NO. D–1–GN–13–002623, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

Attorneys and Law Firms

Sara Hammond, Katherine Ann Harris Farrell, Ross Wyatt Henderson, Benjamin Hallmark, Elizabeth R. B. Sterling, Rex VanMiddlesworth, for Appellee.

Marnie A. McCormick, John F. Williams, for Appellant.

Before Justices Puryear, Pemberton, and Bourland

MEMORANDUM OPINION

David Puryear, Justice

***1** Entergy Texas, Inc. appeals the district court's final judgment upholding the Public Utility Commission's final order in Docket Number 40295, a proceeding to determine the expenses that Entergy may recover for prosecuting its 2011 base-rate case. Entergy complains of the Commission's disallowance of two categories of expenses: (1) the costs of litigating whether financially based incentive compensation is recoverable as a cost of service and (2) depreciation expenses for office equipment charged by its affiliate, Entergy Services, Inc. (ESI), in assisting Entergy in its base-rate case. Entergy also complains about the method the Commission used to quantify the disallowance for litigation of the incentive-compensation issue. We will affirm the judgment of the district court upholding the Commission's final order.

BACKGROUND

In 2011, Entergy, an electric utility that remains subject to traditional cost-of-service rate regulation, *see* Tex. Util.Code § 39.452(a) (until date that Commission authorizes non–ERCOT utility to implement customer choice, utility's rates shall be regulated under traditional cost-of-service regulation), initiated a general base-rate case seeking an annual increase of over $100 million to cover its increased cost of service, including the recovery of its expenses in preparing the rate-case filing and participating in the rate case (Docket Number 39896).[1] *See id.* § 36.061 (Commission may allow as cost or expense "reasonable costs of participating in a proceeding under this title not

to exceed an amount approved by the [Commission]"). The Commission ultimately severed Entergy's request for recovery of rate-case expenses from the general rate case and established new Docket Number 40295 to address those expenses.

One issue in the rate-case docket—whether employee incentive compensation for financially based goals should be recovered through rates as a reasonable and necessary expense—is especially relevant to the amount of rate-case expenses awarded in this case. An amount for payroll costs is usually included among the utility's reasonable and necessary expenses. *See* *Reliant Energy, Inc. v. Public Util. Comm'n,* 153 S.W.3d 174, 183 (Tex.App.—Austin 2004, pet. denied) (operating expenses include employee wages). However, in a 2003 rate case, the Commission began disallowing expenses for employee incentives paid to achieve financial-performance measures because it determined that they are not necessary and reasonable to provide utility services. *See* Tex. Pub. Util. Comm'n, *Application of AEP Tex. Cent. Co. for Auth. to Change Rates,* Docket No. 28840, 2005 WL 6472784, *23 (Jan. 1, 2005) (order). The Commission contrasted such incentives with those paid to achieve operational-performance measures, which it determined provide immediate benefit to ratepayers and are, therefore, recoverable. *Id.; see also* *State of Tex. Agencies & Insts. of Higher Learning v. Public Util. Comm'n,* 450 S.W.3d 615, 660 n.34 (Tex.App.—Austin 2014, pet. granted) (noting that Commission has historically allowed recovery of incentive compensation tied to operational performance but not that tied to financial performance). In its briefing to this Court, Entergy refers to these different incentive-compensation measures (operational versus financial) as two "buckets."

***2** In subsequent rate cases, other utilities (as well as Entergy in two rate cases preceding the one here), presented similar requests to the Commission for allowance of financially based incentive compensation, but the Commission consistently maintained the distinction between the operational-goal and financial-goal "buckets," allowing the former and disallowing the latter. *See* *State of Tex. Agencies & Insts. of Higher Learning,* 450 S.W.3d at 660 & n.34. While there is often a fact question about whether a particular type of incentive compensation goes into one bucket or the other, the basic policy that incentive compensation tied to financial goals is not recoverable has remained constant. *See id.*

In the rate case from which this case was severed, Docket Number 39896, Entergy openly acknowledged the Commission's long-standing policy about the two buckets but, nonetheless, asked the Commission to abandon the distinction between the buckets and allow not only the operationally tied incentive compensation but also all of its financially tied incentive compensation. Entergy enlisted two different witnesses to testify in support of the argument, responded to discovery on the issue, and filed five separate briefs in support of it. The Administrative Law Judge's (ALJ) Proposal for Decision (PFD) stated: "All parties, including [Entergy], agreed that Commission precedent mandated that financially-based incentive compensation is not recoverable. Nevertheless, in its application, [Entergy] asked the Commission to reconsider its precedents on this issue .... contend[ing] that the reason why cost recovery had been denied for financially-based incentive compensation in prior rate cases was that, in those prior cases, there was a lack of evidence showing sufficient benefits to ratepayers." The Commission followed the recommendation of the ALJ in the rate case and disallowed about $520,000 of Entergy's requested rate-case expenses, based on its finding that the amount was "attributable to unreasonable and overly aggressive arguments pursued by [Entergy] in Docket 39896 related to financially [ ] based incentive compensation."

In the instant rate-case-expense docket, Entergy additionally sought recovery of the fees it was charged by its affiliate, ESI, for depreciation of the office equipment its employees used in assisting Entergy in the underlying ratemaking proceeding. Besides adding one new finding of fact and conclusion of law related to the issue,[2] the Commission adopted the ALJ's findings and conclusions in the expenses case, including the finding that Entergy's requested rate-case expenses should be reduced because "$207,683 in depreciation of office equipment owned by [ESI] and used by [ESI] employees for their work in Docket 39896 is not reasonable and is properly disallowed."

STANDARD OF REVIEW

Our review is governed by the "substantial evidence" rule. *See* Tex. Util.Code § 15.001; Tex. Gov't Code § 2001.174; *Anderson v. Railroad Comm'n,* 963 S.W.2d 217, 219 (Tex.App.—Austin 1998, pet. denied). When an appellant contends that an agency's order is not supported

by substantial evidence, we determine whether substantial evidence supports the challenged finding or conclusion, that is, not whether the agency reached the "correct" conclusion but whether some reasonable basis exists in the record for the agency's action. *Texas Health Facilities Comm'n v. Charter Med.–Dall., Inc.,* 665 S.W.2d 446, 452 (Tex.1984); *see also* *City of El Paso v. Public Util. Comm'n,* 883 S.W.2d 179, 185 (Tex.1994) (in conducting substantial-evidence review, we determine whether evidence as whole is such that reasonable minds could have reached conclusion agency must have reached in order to take disputed action). A reviewing court is not bound by the reasons given in an agency order, provided there is a valid basis for the action taken by the agency. *Charter Med.–Dall.,* 665 S.W.2d at 452.

***3** When an appellant complains that an agency decision is arbitrary and capricious, we consider whether an appellant's rights have been prejudiced by a denial of due process, *see* *id.* at 454, or the agency has abused its discretion such as by failing to follow the clear, unambiguous language of its own regulations, *see* *Reliant Energy,* 153 S.W.3d at 199. Examples of agency actions that have been held to be arbitrary and capricious are: when the agency has failed totally to make findings of fact and has relied, instead, on findings in another case; when it bases its decision on non-statutory criteria; and when it excludes competent and material evidence. *Charter Med.-Dall.,* 665 S.W.2d at 454; *see* *City of El Paso,* 883 S.W.2d at 184 (agency decision is arbitrary and capricious if agency (1) failed to consider factor that Legislature directs it to consider; (2) considers irrelevant factor; or (3) weighs only relevant factors as directed by Legislature but reaches completely unreasonable result); *Texas Dep't of Ins. v. State Farm Lloyds,* 260 S.W.3d 233, 245 (Tex.App.—Austin 2008, no pet.) (agency decision may be found to be arbitrary and capricious when it is based on legally irrelevant factors or if agency reaches completely unreasonable result after weighing legally relevant factors).

DISCUSSION

In its first three issues, Entergy complains about various aspects of the Commission's disallowance of its requested costs to litigate the issue of financially based incentive compensation. We will address its first two issues together because they challenge the propriety of the disallowance, and we cannot discern any substantive difference between the two issues that would affect our review, in light of the limited errors that Entergy preserved in its motion for rehearing.[3] *See* *BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Grp.,* 93 S.W.3d 570, 578 (Tex.App.—Austin 2002, pet. denied) (to preserve error in appeal of contested case, motion for rehearing filed with agency must set forth (1) particular finding of fact, conclusion of law, ruling, or other action by agency that complaining party asserts was error and (2) legal basis upon which claim of error rests). Entergy's third issue, which we will address separately, challenges the method by which the Commission quantified the amount of disallowance. In its fourth issue, Entergy complains about the Commission's disallowance of depreciation expenses that Entergy was charged by its affiliate for work performed in the rate case.

Disallowance of expenses to litigate issue of financially based incentive compensation

[1] Entergy contends that the Commission acted arbitrarily by disallowing it to recover litigation expenses incurred in pursuit of the recovery of financially based incentive compensation. Specifically, Entergy contends that the Commission previously allowed the recovery of such expenses but "changed its policy" about their recovery, without notice, at the end of Entergy's ratemaking proceedings to its detriment, which amounted to ad hoc rulemaking. Entergy submits that the Commission should have engaged in formal rulemaking and applied such new policy prospectively only. Appellees respond that Entergy's argument mischaracterizes the Commission's previous "policy" and that, in any case, the Commission's determination here was fact-specific and supported by the evidence in this proceeding and fell within its broad statutory discretion to permit the recovery of only reasonable and necessary rate-case expenses.[4] *See* Tex. Util.Code § 36.061(b)(2). We agree with appellees.

***4** Entergy has not cited any Commission rule or established policy requiring the recovery of rate-case expenses incurred in litigating the type of arguments that the ALJ and Commission found Entergy had unreasonably made on this issue. While Entergy cites a few previous dockets in which the Commission purportedly allowed some form of recovery for rate-case expenses incurred in seeking to include financially based incentive compensation in base

rates, we cannot conclude based on those dockets that the Commission had an established policy *requiring* the recovery of rate-case expenses to litigate the issue, as the determination about expense recovery in any case is a fact-specific inquiry into the expenses and their reasonableness. [5] *See* Tex. Util.Code § 36.061(b)(2) (Commission "*may* allow as a cost or expense ... *reasonable* costs of participating in a [ratemaking] proceeding" (emphases added)). Entergy's argument that it had no prior notice that the Commission would cease allowing recovery of rate-case expenses to litigate the issue of financially based incentive compensation is at odds with its being on notice that not only will the Commission, in its discretion, allow only *reasonable* costs of participating in a ratemaking proceeding but also that the utility bears the burden of proving the reasonableness of any requested such costs.

Entergy cites this Court's opinion in *Oncor Electric Delivery Company LLC v. Public Utility Commission,* 406 S.W.3d 253 (Tex.App.—Austin 2013, no pet.), in support of its argument that the Commission acted arbitrarily in imposing a new policy on Entergy at the end of a proceeding without prior notice. However, that case is distinguishable in several ways, and its holding does not mandate the remedy that Entergy seeks. First, the challenged agency action in *Oncor* was the Commission's failure to previously announce its requirement—imposed on Oncor for the first time after the ratemaking hearings—that a utility obtain Commission pre-authorization to recover rate-case expenses that were incurred outside of the test year and are unrelated to the rate-case proceeding in which they are sought. *Id.* at 264. The Court found that this was a *non*-fact-specific requirement and, therefore, that it was proper to consider how the Commission had treated other utilities with respect to this same issue. *Id.* at 267. In contrast, the determination of whether litigation expenses are "reasonable" is fact-specific, making the value of prior dockets allowing or disallowing certain expenses relatively low.

Secondly, the *Oncor* Court found troubling the fact that the Commission had not articulated any rational connection between the facts of the case and its cursory finding that Oncor's requested recovery would "not be in the public interest." *Id.* at 268. In contrast, here the ALJ and Commissioner both explained their reasoning on the issue, including their determinations based on the evidence that Entergy's total rate-case expenses were very high and that it took unreasonable positions in litigating the incentive-compensation issue in light of clear and consistent precedent to the contrary. Granted discretion to allow the recovery of only "reasonable expenses," the Commission considered the evidence before it and determined that Entergy's "long shot" attempts to recover its rate-case expenses attributable to this issue were not a reasonable expenditure.

We cannot agree with Entergy that the Commission "changed its policy" or engaged in ad hoc rulemaking with respect to the disallowance of costs to litigate the financially based incentive-compensation issue because Entergy has not established that the Commission had such established policy or, in this docket, created a new rule of general applicability. *Cf.* Tex. Gov't Code § 2001.003(6) (defining "rule" as "state agency statement of general applicability"); *Texas Dep't of Transp. v. Sunset Transp., Inc.,* 357 S.W.3d 691, 703 (Tex.App.—Austin 2011, no pet.) (for agency statement to be rule, it must "bind the agency or otherwise represent its authoritative position in matters that impact personal rights"); *see Texas State Bd. of Pharmacy v. Witcher,* 447 S.W.3d 520, 529–31, 535 (Tex.App.—Austin 2014, pet. granted) (holding that Board's decision to suspend pharmacist's license, due solely to policy announced in previous adjudicative matter and without any consideration of differences in factual circumstances between two matters, constituted illegal rulemaking).

*5 **[2]** Furthermore, even though Entergy did not make a substantial-evidence challenge to the Commission's findings or conclusions on this issue in its motion for rehearing and did not preserve that issue for our review, we conclude that there is substantial evidence in the record to support the disallowance. *See Reliant Energy,* 153 S.W.3d at 184 (we presume Commission's findings are supported by substantial evidence, and contestant bears burden of proving otherwise). The record demonstrates that Entergy was fully cognizant of Commission precedent disallowing the recovery of financially based incentive compensation, and that this was the third consecutive docket in four years in which Entergy sought, but failed, to obtain authority to charge ratepayers for this type of financially based incentive cost. [6] Nonetheless, Entergy hired two experts to testify on the matter, filed five separate briefs supporting the argument, and responded to discovery concerning the matter. The ALJ found that the amount of rate-case expenses that Entergy sought was high, both in absolute terms and in relation to the increase ultimately obtained in the underlying docket, and noted that

the size of the granted rate increase was only about 25% of that requested.

While Entergy argues on appeal that its litigation on this issue was an attempt to show, factually, that certain incentive compensation should actually have been included in the operational-based incentive compensation "bucket" instead of the financial-based incentive compensation "bucket," evidence in the record supports appellee's contention that Entergy was, in fact, advocating for the elimination of the two "buckets" entirely, arguing that financially based incentive compensation actually benefits customers and should, therefore, be recovered as a general rule. In more than three pages of its PFD, the ALJ expressed concern that—while *all* parties, including Entergy, "agreed that Commission precedent mandated that financially [ ] based incentive compensation is not recoverable"—Entergy "nevertheless ... asked the Commission to reconsider its precedents on this issue" and noted that it "was obvious throughout the hearing in [the underlying docket] that [Entergy] was taking an aggressive position and making a 'long-shot' argument in seeking recovery for its financially [ ] based incentive compensation." [7]

The Commission did not act arbitrarily or engage in ad hoc rulemaking or "establish a new policy" in this case, and the record contains substantial evidence supporting the Commission's disallowance of expenses to litigate the financially based incentive-compensation issue. Accordingly, we overrule Entergy's first and second issues.

Quantification of disallowance for expenses to litigate long-shot argument

In its third issue, Entergy claims that the Commission acted arbitrarily and capriciously and again engaged in ad hoc rulemaking with its "unexplained departure from Commission precedent" in the method it used to quantify the "long-shot argument" disallowance. The Commission used a so-called "issue-specific approach" (or "proxy" method) to quantify the disallowance (whereby Entergy's rate-case expenses were reduced proportionally to the amount of specific "overreaching" it was deemed to have committed in litigating the issue of financially based incentive compensation). Appellees respond that the Commission's decision was rationally based upon evidence in the record, was not arbitrary and capricious, and was well within its broad discretion under section 36.061(b)(2). *See* Tex. Util.Code § 36.061(b)(2) (Commission may allow reasonable costs of participating in proceeding under PURA); *City of Amarillo v. Railroad Comm'n,* 894 S.W.2d 491, 496–97 (Tex.App.—Austin 1995, writ denied) (approving of Commission's reduction of rate-case expenses by 20% when record showed that applicant failed to adequately support or explain fees charged); *see also City of Port Neches v. Railroad Comm'n,* 212 S.W.3d 565, 579–82 (Tex.App.—Austin 2006, no pet.) (holding that even if Commission relied on some of expert's testimony, it was not required as matter of law to allow recovery of expert's fees as rate-case expense, as Commission's allowance is discretionary and there was evidence in record to show that some of expert's work was necessary for other purposes and not for rate-case proceedings).

***6** The Commission followed the recommendation of the ALJ to employ a proxy for the amount of expenses that Entergy incurred to litigate the issue based on his findings that the complete costs were not clearly identified in the record. The ALJ recommended reducing the balance of Entergy's otherwise reasonably incurred rate-case expenses by the ratio of the disallowed incentive compensation to the total requested rate increase in underlying Docket Number 39896. The Commission followed the ALJ's recommendation and found that over $500,000 of Entergy's rate-case expenses—about 6% of its total requested rate-case expenses—were "related to" the financially based-incentive-compensation argument. [8]

Entergy complains that use of the proxy method was improper because there was uncontroverted evidence of the amount that Entergy paid to outside expert witnesses to support its incentive-compensation argument. However, the Commission found that Entergy incurred additional expenses on this issue: the cost of its staff, ESI staff, and outside counsel with respect to the various filings and discovery responses related to the issue. Furthermore, the record indicates that Entergy did not record and track its rate-case expenses performed by this personnel on an issue-by-issue basis. Therefore, there was no direct method for the Commission to quantify the total expenses related to litigation of the issue. Yet, the Commission was required to quantify the rate-case expenses associated with the issue so as to ensure that it allowed recovery only for Entergy's "reasonable" expenses, and it was Entergy's burden to prove which of its expenses were "reasonable." *See City of Amarillo,* 894 S.W.2d at 496–97 ("The Commission's function as the ultimate arbiter of 'reasonableness' would be nugatory if it were unable to exact

a satisfactory accounting from those seeking reimbursement for rate case expenses.").

[3] The Commission relied on expert testimony from the parties offering various options and rationales for calculating the amount of rate-case expenses to reject due to Entergy's unreasonable overreaching and in the absence of other evidence separating out the expenses on an issue-by-issue basis. The ALJ's PFD discussed the merits of the three approaches[9] offered by the parties based on the evidence presented. Based on the record, we cannot say that there was no reasonable basis for the Commission to use the proxy method to quantify the amount of disallowance attributable to Entergy's "unreasonable" litigation of the financially based incentive-compensation issue. *See* *City of El Paso,* 883 S.W.2d at 186 (holding that substantial evidence supported Commission's disallowance for imprudent expenditures where testimony before Commission ranged from expert opinion that no imprudence disallowance should be imposed, to opinion that 50% disallowance should be imposed, to opinion that there is no known theory to quantify the disallowance, because Commission has discretion to select amount within range of figures provided by expert testimony); *Pioneer Nat. Res. USA, Inc. v. Public Util. Comm'n,* 303 S.W.3d 363, 369 (Tex.App.—Austin 2009, no pet.) (when no evidence suggests a specific figure explicitly, Commission may infer the figure if it is supported by body of evidence as to that issue).

***7** Also, while Entergy cites a few Commission dockets in support of its contention that Commission "precedent" required a different method of quantification, our review of those dockets reveals that they simply do not support Entergy's contention. Rather, they merely indicate the unremarkable fact that the Commission has in some other dockets disallowed expenses in the amount of *actual* expenses associated with the testimony tied to the contested issue. Because the Commission was unable, from the evidence that Entergy produced, to determine the full amount of rate-case expenses associated with the financially based incentive-compensation issue, the Commission was in a position of determining another reasonable method to quantify the disallowance and did not, in choosing one of the methods testified to by various parties, abuse its discretion or act arbitrarily.

Based on this record and the Commission's statutory discretion to allow only reasonable expenses, we conclude that the Commission's method to quantify the disallowed expenses was not arbitrary and capricious and did not amount to ad hoc rulemaking. We overrule Entergy's third issue.

Disallowance of affiliate's depreciation of office equipment as rate-case expense

[4] **[5]** In its fourth issue, Entergy contends that the Commission's disallowance of the depreciation expense that its affiliate ESI used in the work it performed in the rate case was arbitrary and capricious and not supported by substantial evidence.[10] Appellees respond that Entergy failed to meet its burden to prove that the depreciation was reasonable. *See* Tex. Util.Code § 36.061(b)(2) (Commission may allow as cost or expense reasonable costs of participating in proceeding under PURA); *see also id.* § 36.058(b), (c) (Commission may allow payment to affiliate only upon specific findings (1) of reasonableness and necessity of each item or class of items allowed and (2) that price to utility is not higher than prices charged by affiliate for same item or class of items to other of its affiliates or divisions or to unaffiliated entities within same market area or having same market conditions).

We initially note that the Commission has broad discretion to determine recovery of expenses in a ratemaking proceeding. *City of Port Neches,* 212 S.W.3d at 579. Regarding the evidence presented about the reasonableness and necessity of a rate-case expense, the Commission is the sole judge of the weight of the evidence and the credibility of the witnesses. *Id.* As long as there is a reasonable basis in the record—including in the PFD—for the Commission's determination on the evidence pertaining to a requested rate-case expense, the determination is supported by substantial evidence and is not arbitrary. *See id.* at 580–81.

***8** Our review of the evidence cited by all parties leads us to conclude that there is a reasonable basis in the record for the disallowance of ESI's depreciation rate-case expenses. For instance, the Commission could have found that the primary evidence submitted by Entergy in this docket on the issue —a spreadsheet that does not identify which assets were depreciated or their original costs, how the depreciation was calculated, which employees used the assets, or how the assets were amortized—was not sufficiently specific for Entergy to meet its burden of proof on its depreciation expenses attributable to rate-case services.[11] *Cf.* Tex. Util.Code § 36.058(b) (Commission may allow payment to affiliate only upon *specific finding* of reasonableness of *each item or class of items* allowed). While Entergy cites evidence in the underlying ratemaking proceeding[12] in support of its

argument that it met its burden of proof on this issue, the Commission was free to weigh that evidence's credibility or relevance against that submitted by Entergy in the present docket, and we may not substitute our judgment for the Commission's on this question of reasonableness. [13] *See City of Port Neches,* 212 S.W.3d at 571.

Entergy rejoins that we may not affirm the Commission's order on the basis of the evidence being insufficiently detailed and vague because that is not the "stated reason" for the disallowance in the order or PFD. The PFD, which the Commission incorporated into its final order with respect to this issue, specifically noted that Entergy had "failed to prove the reasonableness of the expenses under the more stringent standards that are applicable to affiliate expenses" and made a dispositive fact finding: "$207,683 in depreciation of office equipment owned by [ESI] and used by [ESI] employees for their work in Docket 398896 is not reasonable and is properly disallowed." [14] Thus, the Commission found that Entergy had not met its burden of proving that the depreciation expenses were reasonable, and we must affirm its order on this issue if it is valid under any legal theory. *See AEP Tex. Commercial & Indus. Retail Ltd. P'ship v. Public Util. Comm'n,* 436 S.W.3d 890, 914 (Tex.App.—Austin 2014, no pet.) (we must affirm agency's order if factual bases on which it relied support its decision under any valid legal theory); *Public Util. Comm'n v. Southwestern Bell Tel. Co.,* 960 S.W.2d 116, 121 (Tex.App.—Austin 1997, no pet.) (appellate court must affirm on any *legal* basis shown in record); *cf. City of El Paso v. El Paso Elec. Co.,* 851 S.W.2d 896, 899–900 (Tex.App.—Austin 1993, writ denied) (refusing to uphold agency order on *factual* basis different from that relied on by agency). The Commission's determination on this depreciation-expense issue is valid on the legal basis of evidentiary insufficiency—i.e., that Entergy did not meet its burden of proof—even though the Commission did not state how exactly Entergy did not meet its burden. On this record, we conclude that there was a reasonable basis for the Commission to conclude that allowing Entergy to recover depreciation on ESI's office equipment used to provide services for the underlying rate case would be unreasonable. Accordingly, we overrule Entergy's fourth issue. [15]

CONCLUSION

***9** Having overruled all of Entergy's issues and holding that the trial court did not err in upholding the Commission's final order, we affirm the district court's order.

All Citations

Not Reported in S.W. Rptr., 2016 WL 1179085, Util. L. Rep. P 27,351

Footnotes

1 The Commission's order in the rate case is not challenged in this appeal but has been challenged by various parties in a separate appeal.

2 The Commission added the following finding of fact: "The price for Entergy's affiliate payments is not higher than the prices charged by the supplying affiliate for the same item or class of items to its other affiliates or divisions or a nonaffiliated person within the same market area or having the same market conditions," and the following conclusion of law: "Entergy met the requirements of PURA [Public Utility Regulatory Act] § 36.058 regarding payments to its affiliate for its rate-case expenses."

3 Entergy raised three issues in its motion for rehearing, arguing that: (1) the Commission engaged in ad hoc rulemaking by retroactively applying to Entergy a new policy of disallowing rate-case expenses incurred in pursuit of the recovery of financially based incentive compensation; (2) the Commission's use of the "proxy" method to quantify the amount of disallowance for financially based incentive compensation was a significant departure from precedent, and there was no logical relationship between the method and the evidence of actual expenses; and (3) the Commission's disallowance of depreciation expenses was based on an "erroneous conclusion" without "logical rationale," in light of the fact that other nonaffiliated vendors

presumably "embedded" depreciation costs in their invoices instead of itemizing them as Entergy's affiliate did.

4 Appellees also note that *after* this docket, in 2014, the Commission *did* engage in formal rulemaking and adopt a rule regarding rate-case expenses, *see* 16 Tex. Admin. Code § 25.245 (Pub. Util. Comm'n, Rate–Case Expenses) (among other matters, listing criteria for "review and determination of reasonableness" of rate-case expenses, including whether utility's "proposal on an issue in the rate case had no reasonable basis in law, policy, or fact and was not warranted by any reasonable argument for the extension, modification, or reversal of commission precedent"), and that this is further indication that the Commission was not adopting a rule in this case.

5 Moreover, Entergy overstates the Commission's "allowance" of expenses to litigate similar arguments in prior dockets. The first of the three dockets it cites was resolved by settlement, wherein the parties stipulated to recoverable rate-case expenses; the second docket indicates that no parties opposed the utility's requested rate-case expenses, so the reasonableness of the request was not specifically at issue (while in the present docket, several parties, including Commission staff, strongly opposed Entergy's request and the reasonableness of its litigation position); and the third docket was the first case in which the Commission determined that financially based incentive compensation may not be recovered in rates, so there was no long-standing policy against which the utility was arguing, opposite to the circumstances here.

6 In its two previous dockets and the docket on appeal, Entergy employed the same expert witness on this issue, Dr. Jay Hartzell. The two prior dockets were resolved by settlement agreement and, therefore, cannot serve to establish Commission "precedent" about recovery of rate-case expenses to litigate the issue.

7 The ALJ in the rate-case expense proceeding was also one of the presiding ALJs in the underlying ratemaking docket.

8 The ALJ had actually suggested a 14.8% reduction in Entergy's requested expenses, based on the fact that Entergy had also unsuccessfully sought transmission-equalization payments of $9 million in the underlying rate case. The Commission "disagree[d] with the ALJ that Entergy's rate-case expenses should be reduced due to Entergy's request for transmission equalization (MSS–2 expenses) ... [because] the request for the MSS–2 expenses did not conflict with clear Commission precedent."

9 The other two approaches offered were the "50/50 approach" (whereby Entergy would receive only 50% of its rate-case expenses) and the "results-obtained approach" (whereby Entergy's rate-case expenses would be reduced in proportion to the ratio of their rate-case recovery—in this case, receiving only 26.4% of its rate-case expenses).

10 In this issue, Entergy also complains that the Commission's ultimate finding of fact on the reasonableness of the expenses was not supported by any underlying findings and therefore is reversible on this basis. *See* Tex. Gov't Code § 2001.141(d) ("Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings."); *Texas Health Facilities Comm'n v. Charter Med.–Dall., Inc.,* 665 S.W.2d 446, 451–52 (Tex.1984). However, Entergy waived this alleged error by not raising it in its motion for rehearing before the Commission. *See BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Grp.,* 93 S.W.3d 570, 578 (Tex.App.—Austin 2002, pet. denied) (party's complaints in motion for rehearing that "overwhelming evidence" supported finding in favor of party on permit-duration issue and that agency improperly shifted burden of proof on issue are insufficient to preserve error about lack of fact findings and conclusions of law on same issue); *United Savs. Ass'n of Tex. v. Vandygriff,* 594 S.W.2d 163, 167–70 (Tex.Civ.App.—Austin 1980, writ ref'd n.r.e.) (where motion for rehearing did not sufficiently specify legal basis of error but only cited generally to statute imposing several requirements upon

agency, appellant waived error on appeal complaining that agency order did not contain requisite underlying findings of fact supporting ultimate findings and conclusions).

11 Entergy's evidence included summary sheets showing depreciation and amortization expenses and referenced an "attached detail page," but there was no such page attached.

12 The ALJ took judicial notice of the administrative record in the underlying ratemaking proceeding (Docket Number 39896).

13 For example, the Commission argues that the testimony in the underlying docket on which Entergy relies as providing some of the missing depreciation detail is not relevant because it refers to expenses incurred during the test year rather than rate-case expenses, many of which occurred *after* the test year, and is unclear about whether the same assets were being depreciated in both time frames.

14 The Commission and ALJ both also noted that there was no Commission precedent allowing for depreciation expenses of the type that Entergy was seeking here. While Entergy argued in its motion for rehearing that other, nonaffiliated vendors presumably "embedded" their depreciation costs within their invoices rather than separating them out as line-items (to meet Commission regulations) as Entergy did here, Entergy does not identify any evidence in the record supporting this speculation. Even were such evidence in the record, the Commission was free to weigh it against the cursory evidence that Entergy submitted summarizing ESI's depreciation.

15 We also reject Entergy's argument that the Commission's disallowance was unreasonable because similar expenses were deemed reasonable and necessary for inclusion in the rate base in the underlying rate case. The statutory standards for recovery of reasonable and necessary expenses for rate cases and rate-case-expense cases are different. *Compare* Tex. Util.Code § 36.051 (in establishing utility's rates, Commission shall establish overall revenues at amount that will permit utility reasonable opportunity to earn reasonable return on utility's invested capital in excess of its reasonable and necessary *operating expenses*) *and* 16 Tex. Admin. Code § 25.231(a) (Pub. Util. Comm'n, Cost of Service) (expense may be included to extent that it is based upon "cost of rendering service to the public during a historical test year"), *with* Tex. Util.Code § 36.061(b)(2) (Commission *may* allow as cost or expense reasonable costs of *participating in proceeding* under PURA not to exceed amount approved by Commission). Furthermore, this Court has previously rejected the very same argument, in which a utility made "a subtle, yet impermissible leap" in arguing that because a utility may recover an expense as a payment to an affiliate as an expense or cost of service in a ratemaking proceeding, it is thereby entitled to those same expenses as "rate case expenses." *City of Port Neches v. Railroad Comm'n,* 212 S.W.3d 565, 581 (Tex.App.—Austin 2006, no pet.).

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212 S.W.3d 565
Court of Appeals of Texas,
Austin.

CITY OF PORT NECHES, City of Nederland, City of Groves, and Texas Gas Service Company, Appellants,
v.
RAILROAD COMMISSION OF TEXAS, Appellee.

No. 03–05–00777–CV.
|
Aug. 4, 2006.

Synopsis

Background: Gas utility and cities in utility's service area sought judicial review of decision of Railroad Commission that awarded rate increase to utility. The District Court, Travis County, 201st Judicial District, Suzanne Covington, J., affirmed Commission's order. Cities and utility appealed.

Holdings: The Court of Appeals, W. Kenneth Law, C.J., held that:

[1] utility's costs regarding acquisition of its predecessor constituted a "known and measurable change";

[2] utility's decision to limit its initial rate increase request to amount that did not include costs of acquiring utility's predecessor did not result in waiver of utility's right to recover acquisition costs;

[3] Commission acted within its discretion when it excluded settlement revenues that utility would receive from one city;

[4] forfeited discount rates (FDRs) could not be treated as revenue credit; and

[5] record was sufficient to support Commission's decision to disregard essentially undisputed testimony of attorney that utility's requested expenses for consultant's work was reasonable and necessary.

Affirmed in part, reversed in part, and remanded with instructions.

Procedural Posture(s): On Appeal.

West Headnotes (19)

[1] Gas ⇨ Scope of review and trial de novo

Court of Appeals reviews an order of the Railroad Commission in a gas ratemaking proceeding for substantial evidence. V.T.C.A., Government Code § 2001.174; V.T.C.A., Utilities Code § 105.001.

[2] Gas ⇨ Presumptions

Under standard of review that is used when deciding appeals in actions seeking judicial review of order of Railroad Commission in gas ratemaking proceeding, Court of Appeals presumes that the Commission's findings are supported by substantial evidence, and the contestant bears the burden of proving otherwise. V.T.C.A., Government Code § 2001.174; V.T.C.A., Utilities Code § 105.001.

[3] Gas ⇨ Scope of review and trial de novo

Although substantial evidence requires more than a scintilla, the evidence may actually preponderate against the Railroad Commission's decision in gas ratemaking proceeding, and the Court of Appeals must still uphold it if enough evidence suggests that the determination was within the bounds of reasonableness, that is, if substantial evidence supports its determination. V.T.C.A., Government Code § 2001.174; V.T.C.A., Utilities Code § 105.001.

[4] Gas ⇨ Findings and orders

Although the record from gas ratemaking proceeding before Railroad Commission may contain conflicting evidence, credibility is lent to the Commission's ultimate resolution of those conflicts when the record, evaluated as a whole, reflects a process of discussion, careful consideration, and compromise. V.T.C.A., Government Code § 2001.174; V.T.C.A., Utilities Code § 105.001.

[5] **Administrative Law and Procedure** ⚿ Wisdom, judgment, or opinion in general

Court of Appeals may not substitute its judgment for that of an agency on questions committed to agency discretion.

[6] **Gas** ⚿ Operating expenses in general

For purposes of provision of state Gas Utility Regulatory Act (GURA) that requires Railroad Commission to calculate necessary rate change on appeal from municipality's decision by starting with total test year presented to municipality and then adjusting that amount for known and measurable change, utility's costs regarding acquisition of its predecessor constituted a "known and measurable change," even though rate presented to cities and publicly noticed did not include acquisition costs; acquisition costs were incurred after close of test year, and utility's updated filing reflected additional expenses based on acquisition. V.T.C.A., Utilities Code §§ 103.001, 103.051, 103.055(a, b), 104.102, 104.103.

[7] **Gas** ⚿ Statutory and municipal regulation in general

Railroad Commission's authority to regulate gas utilities is not without limit; the Commission is a creature of statute and has no powers other than those expressly conferred on it by the legislature or implied as reasonably necessary to fulfill its express functions. V.T.C.A., Utilities Code § 102.001 et seq.

[8] **Gas** ⚿ Statutory and municipal regulation in general

Gas ⚿ Municipal regulation

Municipality can surrender its authority concerning rates, operations, and services of gas utility within municipality to the state Railroad Commission. V.T.C.A., Utilities Code §§ 102.001(a)(1)(B), 103.001, 103.003.

1 Cases that cite this headnote

[9] **Gas** ⚿ Elements considered in general

Railroad Commission has discretion over what adjustments to make for known and measurable changes when calculating necessary rate change in gas ratemaking proceeding. V.T.C.A., Utilities Code § 103.055(a).

[10] **Gas** ⚿ Scope of review and trial de novo

Gas ⚿ Presumptions

In reviewing the Railroad Commission's order in gas ratemaking proceeding, Court of Appeals presumes that there is substantial evidence in the record to support the Commission's calculation of known and measurable changes, but the Court of Appeals must determine if the Commission's decision was in violation of the statute, in excess of its statutory authority, or was arbitrary and capricious or characterized by an abuse of discretion. V.T.C.A., Government Code § 2001.174; V.T.C.A., Utilities Code §§ 103.055(a), 105.001.

[11] **Gas** ⚿ Elements considered in general

Provision of state Gas Utility Regulatory Act (GURA) that entitles Railroad Commission to review municipal ratemaking decision de novo allows Commission to award rate increase greater than request made at municipal level because that amount may be adjusted for known and measurable changes, which allows upward adjustment. V.T.C.A., Utilities Code § 103.055(a, b).

[12] **Gas** ⚿ Operating expenses in general

Gas utility's decision to limit its initial rate increase request to amount that did not include costs of acquiring utility's predecessor did not result in waiver of utility's right to recover acquisition costs as known and

measurable change in proceeding before Railroad Commission concerning appeal of cities' ratemaking decision; utility was entitled to seek lower amount in attempt to settle negotiations expeditiously. V.T.C.A., Utilities Code § 103.055(a, b).

[13] **Gas** ⇨ Elements considered in general

State Railroad Commission acted within its discretion in gas ratemaking proceeding when it excluded settlement revenues that gas utility would receive from one city in four-city service area from being considered as a known and measurable change; increased settlement revenues were speculative since that one city's rates would be reduced only if any of remaining three cities obtained lower rates, and settlement revenues were outside scope of test year. V.T.C.A., Utilities Code §§ 101.003(16), 103.055(a), 103.056.

[14] **Gas** ⇨ Elements considered in general

Gas utility's forfeited discount rates (FDRs), which consisted of five-percent penalty that was added to any bill not paid within 15 days of issuance and which was imposed on one city that settled with utility in four-city service area, could not be treated as revenue credit when Railroad Commission was setting rates for service area in appeal from city's ratemaking decision; under-recovery of utility's rates would have occurred if FDRs were credited because revenues would never be collected from three non-settling cities, but were instead being paid by settling city. V.T.C.A., Government Code § 2001.174.

[15] **Gas** ⇨ Evidence

Record in gas ratemaking proceeding was sufficient to support Railroad Commission's decision to disregard essentially undisputed testimony of attorney that gas utility's requested expenses for consultant's work was reasonable and necessary; Commission adopted reasoning of hearing examiners as set forth in proposal for decision (PFD), and examiners concluded that consultant was retained to ascertain effects of utility's acquisition of predecessor utility and that consultant's work was needed primarily as result of acquisition. V.T.C.A., Utilities Code § 104.055(d, e); 16 TAC § 7.5530(a, b).

[16] **Gas** ⇨ Operating expenses in general

Railroad Commission has broad discretion to determine recovery of expenses in a gas ratemaking proceeding. V.T.C.A., Utilities Code § 104.055(d, e); 16 TAC § 7.5530(a, b).

1 Cases that cite this headnote

[17] **Gas** ⇨ Findings and orders

Gas ⇨ Evidence

Regarding the evidence presented about the reasonableness and necessity of a rate case expense in a gas ratemaking proceeding, the Railroad Commission is the sole judge of the weight of the evidence and the credibility of the witnesses; however, the Commission may not disregard undisputed facts or testimony unless the record contains some explanation or reason upon which the reasonableness of their action might be judged. V.T.C.A., Utilities Code § 104.055(d, e); 16 TAC § 7.5530(a, b).

3 Cases that cite this headnote

[18] **Gas** ⇨ Findings and orders

Railroad Commission's explanation or reason for disregarding undisputed facts or testimony concerning reasonableness and necessity of a rate case expense in a gas ratemaking proceeding need not appear in the final order; it is sufficient if it is contained elsewhere in the record, such as in the proposal for decision (PFD). V.T.C.A., Utilities Code § 104.055(d, e); 16 TAC § 7.5530(a, b).

2 Cases that cite this headnote

[19] **Gas** ⇨ Operating expenses in general

Just because gas utility's acquisition costs concerning predecessor utility could qualify

as "expense or cost of service" under provision of state Gas Utility Regulatory Act (GURA) governing allowable expenses did not automatically entitle utility to recover as rate case expense the fees of consultant who was used to sponsor reasonableness and necessity of that "expense or cost of service" in ratemaking proceeding; Commission's regulations required Commission to consider all relevant factors and determine whether rate case expense was reasonable and necessary to ratemaking proceeding. V.T.C.A., Utilities Code § 104.055(b); 16 TAC § 7.5530.

2 Cases that cite this headnote

Attorneys and Law Firms

***568** Harry P. Wright, L. Bruce Gregory, Wright & Pitre, Port Neches, for Cities.

James W. Checkley Jr., John K. Arnold, J. Alan Holman, Locke, Liddell & Sapp, LLC, Austin, for Texas Gas Service Company.

Liz Bills, Suzanne Antley, Assistant Attorneys General, Natural Resources Division, Austin, for Appellee.

Before Chief Justice LAW, Justices PATTERSON and PEMBERTON.

OPINION

W. KENNETH LAW, Chief Justice.

This appeal arises from the district court's affirmance of a final order entered by the Railroad Commission awarding an increase in Texas Gas Service Company's ("TGS's") gas rates for three of the four cities comprising the South Jefferson County Service Area ("SJC service area")—the Cities of Port Neches, Nederland, and Groves.[1] Appellants include the ***569** Cities and TGS, a gas utility that is subject to the Gas Utility Regulatory Act. *See* Tex. Util.Code Ann. § 101.003(7) (West Supp.2005); § 101.006(b) (West 1998). Although the Cities and TGS both challenge the district court's affirmance of the Commission's final order, they take opposing positions. Essentially, the Cities raise two issues arguing that the awarded rate increase was too high, while TGS raises two contrary issues arguing that the awarded rate increase and rate case expenses were too low. We will affirm in part and reverse and remand in part.

BACKGROUND

On November 15, 2002, Southern Union Gas (a predecessor of TGS) requested an annual rate increase of $853,761 for all four cities in the SJC Service Area. This requested increase was based on test-year data ending in March 2002. The test-year data was systemwide, meaning that it was compiled for all four cities in the SJC service area. Southern Union published a public notice of the $853,761 requested rate increase. The notice was posted in a local newspaper of general circulation from November 30 until December 30, 2002. *See id.* §§ 104.102–.103 (West 1998).

Southern Union's Texas division was then bought by ONEOK Corporation. Texas Gas Service (TGS), as a division of ONEOK, took over the operations of the SJC service area beginning in January 2003. TGS continued the negotiations begun by Southern Union regarding the rate increase in the SJC service area.

In March 2003, TGS and the City of Port Arthur entered into a settlement agreement whereby Port Arthur agreed to pay the increased rates requested by TGS in exchange for the inclusion of a "most favored nation" clause in the settlement agreement. This clause provided that if any of the remaining cities in the SJC service area obtained lower rates, Port Arthur would receive the benefit of those rates.

In April 2003, TGS and the remaining cities in the SJC service area—the Cities of Port Neches, Groves, and Nederland—mediated an agreement whereby TGS would file an updated rate request to reflect the costs arising from ONEOK's/TGS's acquisition of Southern Union.[2] The agreement expressly stated that the updated filing would be considered as part of a "hearing in progress," rather than a new request.

Pursuant to the mediated agreement, on June 27, 2003, TGS filed an updated rate request with the Cities based on a systemwide test year ending December 31, 2002. The updated request reflected that TGS could justify an increase of $1,013,007, but would seek an increase of $853,761 from the Cities, which was the original amount of increase sought by Southern Union in November 2002.[3] On appeal, the Cities characterize this updated filing as a "waiver" by TGS