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**SOAH DOCKET NO. 473-22-04394
PUC DOCKET NO. 53719**

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

**COMMISSION STAFF'S RESPONSE
TO ENTERGY TEXAS, INC.
SECOND REQUEST FOR INFORMATION
QUESTION NOS. ETI 2-1 THROUGH ETI 2-3**

The Staff (Staff) of the Public Utility Commission of Texas (Commission) stipulates that the following responses to requests for information may be treated by all parties as if the answers were filed under oath.

Dated: November 14, 2022

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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CERTIFICATE OF SERVICE

I certify that unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on November 14, 2022 in accordance with the Second Order Suspending Rules, filed in Project No. 50664.

/s/ Margaux Fox
Margaux Fox

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**COMMISSION STAFF'S RESPONSE
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ETI 2-1 Is it Ms. Stark's position that a utility should be required to reveal privileged information in order to secure recovery of reasonable outside counsel costs as rate case expenses? If so, provide all support for her position.

Response: It is Ms. Stark's position that in order to secure recovery of reasonable outside counsel costs as rate-case expenses a utility must comply with 16 TAC § 25.245, which requires the utility to detail and itemize all rate-case expenses, including evidence showing the time and labor expended by attorneys, and requires the presiding officer to decide whether and 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. It is unclear to Ms. Stark how the presiding officer can make the required findings with respect to tasks performed by an attorney when redactions preclude them from knowing what the tasks are. The rule does not provide any exceptions or less stringent requirements for confidential or privileged information. In fact, as noted in Ms. Stark's direct testimony, in response to a proposal that 16 TAC § 25.245 authorize redaction of attorney invoices, the Commission explicitly declined to adopt such a provision.

Prepared by: Ruth Stark
Sponsored by: Ruth Stark

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ETI 2-2 With respect to Ms. Stark's testimony regarding redacted invoices, through what means may a utility both preserve privileged information and obtain a reasonable opportunity to recover its rate case expenses?

Response: As an initial matter, to the extent the use of the words "reasonable opportunity to recover" is intended to imply that the legal standard for recovery of rate case expenses under PURA § 36.061(b)(2) is the same as the standard for recovery of operating expenses in establishing rates under PURA §36.051, Staff objects to the premise of the question. A reading of these statutory provisions, as well as their interpretation in the Texas Court of Appeals' decision in *Entergy Texas, Inc. v. Public Utility Commission of Texas*¹ (No. 03-14-00706-CV as cited in Ms. Stark's direct testimony) confirms that the standards are not the same:

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).²

Additionally, with respect to its rate-case expenses in this proceeding, when asked in discovery to provide signed affidavits by each professional stating (among other things) that the rate charged is the normal hourly billing rate charged by the professional, and is the normal billing rate charged by the professional for services to non-regulated entities, ETI objected to providing such affidavits for its attorneys, arguing among other things that "[a] utility determines how best to present its case

¹ *Entergy Texas, Inc. v. Pub. Util. Comm'n of Texas*, No. 03-14-00706-CV, 2016 WL 1179085 (Tex. App. Mar. 24, 2016)

² *Id.* at Footnote 15.

in order to meet its burden.” Based on ETI’s assertion, and, given that the Commission has discretion whether to allow ETI’s rate-case expenses, ETI should itself determine how best to preserve its privileged information and still meet the Commission’s requirements for recovery.

Docket No. 53601, Oncor’s pending rate case, provides an example of how a utility balanced its privileged information with the requirements of complying with 16 TAC § 25.245. In that case, Oncor initially provided copies of legal invoices in response to discovery requests that were heavily redacted, asserting that they contained privileged information. Oncor explained in its rebuttal testimony that the unredacted invoices would be provided near the end or after the hearing on the merits when it no longer had concerns about the disclosure of its attorney work product and legal strategy in the proceeding. Subsequent to the hearing on the merits Oncor did in fact provide unredacted copies of all legal invoices.

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ETI 2-3 Is it Ms. Stark's position that the Commission's rules or applicable law requires a utility to waive the privilege as to information contained in outside counsel invoices in order to secure recovery of the outside counsel costs shown in those invoices? If so, provide all support for her position.

Response: It is Ms. Stark's position that a utility must comply with 16 TAC § 25.245 to secure recovery of outside counsel costs as rate-case expenses and it is her opinion that when presented documentation by a utility that excludes descriptions of tasks performed by outside counsel due to assertion of privilege, Staff is unable to recommend to the Commission that such expenses are in compliance with the rule. Given this fact, and the Commission's discretion to allow or disallow recovery of rate-case expenses under 36.061(b)(2), it is therefore up to the Commission itself to determine if expenses for which privilege is claimed comply with 16 TAC § 25.245 and are recoverable.

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