

**7.4 Remedies.** Notwithstanding any exercise by Agency of its rights of early termination, Outside Counsel shall not be relieved of any liability to Agency for damages due to Agency by virtue of any breach of this OCC by Outside Counsel or for amounts otherwise due Agency by Outside Counsel.

**7.5 Termination by Outside Counsel.** Consistent with applicable rules of professional conduct, Outside Counsel may terminate this OCC upon reasonable notice for material breach by Agency.

#### **Section 8. Certifications of Outside Counsel**

By agreeing to and signing this OCC, Outside Counsel hereby makes the following certifications and warranties:

**8.1 Delinquent Child Support Obligations.** Outside Counsel certifies that it is not ineligible to receive any grant, loan, or payment under this OCC pursuant to Section 231.006 of the Texas Family Code and acknowledges that this OCC may be terminated and payment may be withheld if this certification is inaccurate.

**8.2 Buy Texas.** With respect to any services purchased pursuant to this OCC, Outside Counsel represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and within a comparable period of time when compared to non-Texas products and materials. This subsection does not apply to Outside Counsel providing legal services located outside the State of Texas.

**8.3 Gift to Public Servant.** Outside Counsel warrants that it has not given, nor does it intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the award of this OCC.

**8.4 Franchise Tax.** By signing this OCC, Outside Counsel certifies that its Texas franchise tax payments are current, or that it is exempt from or not subject to such tax, consistent with Chapter 171 of the Texas Tax Code.

**8.5 Outside Counsel License/Conduct.** Outside Counsel certifies that each attorney performing services under this OCC is an attorney in good standing under the laws of the State of Texas or the jurisdiction where the representation occurs. Outside Counsel will notify Agency and the OAG in writing within one business day of any lapse in an assigned attorney's licensed status or any final disciplinary action taken against an assigned attorney. For the Lead Counsel(s) named in Addendum B, Outside Counsel will provide documentation of good standing from the state bar or the licensing authority of the jurisdiction in which the attorney resides and is licensed. An attorney that is not licensed by the State Bar of Texas may not provide legal services and advice concerning Texas law.

**8.6 Debt to State.** Outside Counsel acknowledges and agrees that, to the extent Outside Counsel owes any debt (child support or other obligation) or delinquent taxes to the State of Texas, any payments Outside Counsel are owed under this OCC may be applied by the Comptroller of Public Accounts toward any such debt or delinquent taxes until such debt or delinquent taxes are paid in full.

**8.7 Prohibited Bids and Contracts.** Under Section 2155.004 of the Texas Government Code, Outside Counsel certifies that it is not ineligible to receive this OCC and acknowledges that this OCC may be terminated and payment withheld if this certification is inaccurate.

**8.8 Former Executive Head and Employees of the Agency.** Agency and Outside Counsel certify that this OCC is compliant, and will remain in compliance during the OCC term, with Sections 669.003 (Contracting with Executive Head of State Agency) and 2252.901 (Contracts with Former or Retired Agency Employees) of the Texas Government Code.

## **SECTION 9. GENERAL TERMS AND CONDITIONS**

**9.1 Independent Contractor.** Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel and Outside Counsel's subcontractors are independent contractors of Agency or the State of Texas and are not employees of Agency or the State of Texas.

**9.1.1** Outside Counsel will be solely and entirely responsible for its acts and the acts of its agents, employees, subcontractors, and representatives in the performance of this OCC.

**9.1.2** Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel shall be entirely responsible for the liability and payment for Outside Counsel or Outside Counsel's employees or assistants, of all taxes of whatever kind, arising out of the performances in this OCC. Other than the payments described in this OCC, Outside Counsel agrees and acknowledges that Outside Counsel or Outside Counsel's employees or assistants shall not be entitled to any State benefit on account of the services provided hereunder. AGENCY SHALL NOT BE LIABLE TO OUTSIDE COUNSEL, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION, OR ANY BENEFIT DUE TO A STATE EMPLOYEE. If Agency or the State of Texas shall nonetheless become liable for such payments or obligations, Outside Counsel shall promptly pay or reimburse Agency or the State of Texas for such liability or obligation.

**9.2 Assignment of OCC.** Outside Counsel may not assign this OCC, or assign or delegate any right or duty under this OCC, without prior written approval from the Agency and the OAG.

**9.3 Survival.** The obligations of Outside Counsel under the following sections and subsections shall survive the termination or expiration of this OCC: 3.3, 4, 5, 6.5, 7.1, 7.3, 7.4, 9.7, 9.8, 9.11, and 9.13.



**9.4 Copyright/Intellectual Property.** Outside Counsel shall take reasonable measures to protect Agency from material risks of Agency liability known to Outside Counsel for copyright or patent infringement or disclosure of trade secrets resulting from the use of any equipment, materials, information, or ideas furnished by Outside Counsel pursuant to this OCC (other than equipment, materials, information, or ideas supplied or required by Agency or its employees or other agents). Outside Counsel and Agency agree to furnish timely written notice to each other, and to the OAG, of any claim of copyright, patent, trade secret, or other intellectual property infringement arising out of services under this OCC.

**9.5 Media Releases or Pronouncements.** Outside Counsel understands that the OAG and Agency do not endorse any vendor, commodity, or service. Outside Counsel, its employees, representatives, agents, or subcontractors may not participate in any media event or issue any media release, advertisement, publication, editorial, article, or public pronouncement that pertains to this OCC or the services or project to which this OCC relates or that mentions the OAG or Agency without the prior written approval of the OAG and Agency.

**9.6 Written Notice Delivery.** Any notice required or permitted to be given under this OCC by one party to the other party shall be in writing and shall be given and deemed to have been given immediately if delivered in person to the recipient's address set forth in this subsection, or on the date shown on the certificate of receipt if placed in the United States mail, postage prepaid, by registered or certified mail with return receipt requested, addressed to the receiving party at the address hereinafter specified.

**9.6.1 Outside Counsel's Address.** The address for Outside Counsel for all purposes under this OCC and for all notices hereunder shall be:

[Outside Counsel Name and Address]

**9.6.2 OAG's and Agency's Addresses.** The addresses for the OAG and Agency for all purposes under this OCC, except as provided by subsection 6.4, and for all notices hereunder shall be:

Outside Counsel Contract Coordinator  
Office of the Attorney General  
General Counsel Division, Mail Code 074  
Post Office Box 12548  
Austin, Texas 78711-2548

[Agency Contact Name]

[Title]

[Agency Name]

[Street Address]

[City, State, Zip]

## **9.7 Dispute Resolution.**

**9.7.1** The dispute resolution process provided for in Chapter 2260 of the Texas Government Code shall be used, as further described herein, by Agency and by Outside Counsel to attempt to resolve any claim for breach of this OCC made by Outside Counsel.

**9.7.2** Outside Counsel's claims for breach of this OCC that the Parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260, subchapter B, of the Government Code. To initiate the process, Outside Counsel shall submit written notice, as required by subchapter B, to the Agency's contact with a copy to the First Assistant Attorney General or his/her designee. Said notice shall specifically state that the provisions of Chapter 2260, subchapter B, are being invoked. A copy of the notice shall also be given to all other representatives of Outside Counsel and Agency otherwise entitled to notice under this OCC. Compliance by Outside Counsel with subchapter B is a condition precedent to the filing of a contested case proceeding under Chapter 2260, subchapter C, of the Government Code.

**9.7.3** The contested case process provided in Chapter 2260, subchapter C, of the Texas Government Code is Outside Counsel's sole and exclusive process for seeking a remedy for any and all alleged breaches of this OCC by Agency or the State of Texas if the Parties are unable to resolve their disputes under Section 9.7.2.

**9.7.4** Compliance with the contested case process provided in Chapter 2260, subchapter C, of the Texas Government Code is a condition precedent to seeking consent to sue from the Legislature under Chapter 107 of the Texas Civil Practices and Remedies Code. Neither the execution of this OCC by Agency nor any other conduct of any representative of Agency relating to this OCC shall be considered a waiver of sovereign immunity.

**9.7.5** The submission, processing, and resolution of Outside Counsel's claim is governed by the published rules, if any. If no Agency rules have been published, then Title 1, Chapter 68 of the Texas Administrative Code adopted by the OAG pursuant to Chapter 2260, as currently effective, hereafter enacted, or subsequently amended, shall govern.

## **9.8 Conflict of Interest.**

**9.8.1** Funds appropriated by the General Appropriations Act may not be expended to pay the legal fees or expenses of Outside Counsel in representing Agency in a contested matter if Outside Counsel is representing a plaintiff in a proceeding seeking monetary damages from the State of Texas or any of its agencies. *See* General Appropriations Act, art. IX, sec. 16.01(j). For these purposes, "proceedings seeking monetary damages" do not include actions for tax refunds, compensation for exercise of eminent domain authority, or reimbursement of costs of litigation and attorney's fees.

**9.8.2** Funds appropriated by the General Appropriations Act may not be used to pay the legal fees or expenses of Outside Counsel under this OCC if Outside Counsel currently represents, has represented in the six months preceding this OCC, or will represent in the six months following the termination of this OCC, a client before the Agency. *See* General Appropriations Act, art. IX, sec. 16.01(a)(4).

**9.8.3** Outside Counsel shall regularly conduct conflicts analyses on its interests and those of its clients and any subcontractor and disclose any actual or potential conflict to Agency.

**9.9 Taxes.** This OCC shall not be construed so as to supersede the laws of the United States or the State of Texas that accord the State of Texas, Agency, and all departments, agencies, and instrumentalities of the State of Texas exemptions from the payment(s) of all taxes of whatever kind. More specifically, Agency shall not directly or indirectly be liable for taxes of any kind. To the extent allowed by law, Agency will provide, upon the request of Outside Counsel during this OCC Term, all applicable tax exemption documentation.

**9.10 Signatories.** Having agreed to the terms herein, the undersigned signatories hereby represent and warrant that they have authority to enter into this OCC and are acting in their official capacities.

**9.11 Applicable Law and Venue.** This OCC is made and entered into in the State of Texas, and this OCC and all disputes arising out of or relating to this OCC shall be governed by the laws of the State of Texas, without regard to any otherwise applicable conflict of law rules or requirements.

Outside Counsel agrees that the Agency and/or the State of Texas do not waive any immunity (including, without limitation, state or federal sovereign immunity). Outside Counsel further agrees that any properly allowed litigation arising out of or in any way relating to this OCC shall be commenced exclusively in a court of competent jurisdiction in Travis County, Texas. Outside Counsel thus hereby irrevocably and unconditionally consents to the exclusive jurisdiction of a court of competent jurisdiction in Travis County, Texas for the purpose of prosecuting and/or defending such litigation. Outside Counsel hereby waives and agrees not to assert: (a) that Outside Counsel is not personally subject to the jurisdiction of a court of competent jurisdiction in Travis County, Texas, (b) that the suit, action or proceeding is brought in an inconvenient forum, (c) that the venue of the suit, action or proceeding is improper, or (d) any other challenge to jurisdiction or venue.

**9.12 Amendments.** This OCC, including addenda hereto, may be amended only upon written agreement signed by the Parties and approved by the OAG.

**9.13 Severability/Interpretation.** The fact that a particular provision in this OCC is held under any applicable law to be void or unenforceable in no way affects the validity of other provisions, and this OCC will continue to be binding on both Parties. Any provision that is held to be void or unenforceable will be interpreted by the Parties or the courts to be replaced with language that is as close as possible to the intent of the original provision so as to effectuate the

purpose of this OCC. Any ambiguous or conflicting terms shall be interpreted and construed in such a manner as to accomplish the purpose of this OCC.

**9.14 Insurance Required.** Outside Counsel presently maintains malpractice insurance in an amount of not less than [        \$        ].

Outside Counsel agrees to maintain at least this amount of insurance coverage during this OCC Term. Further, Outside Counsel agrees to give notice to Agency and to the OAG in the event any amount of malpractice insurance is canceled. Outside Counsel also agrees to furnish to Agency or the OAG certified copies of such insurance policies when requested. Outside Counsel agrees that no claim by Agency and the State of Texas for damages resulting from breach of Outside Counsel's duties to Agency under this OCC shall be limited to the amount of malpractice insurance maintained by Outside Counsel.

**IN WITNESS THEREOF, THE PARTIES HAVE SIGNED AND EXECUTED THIS OCC.**

[Firm Name]

[Agency]

---

[Authorized Signatory]  
[Firm Address]  
[City, State, Zip]  
[Phone]  
[Fax]  
[Email]  
Tax ID#

---

[Authorized Signatory]  
[Title]  
[Agency Name]

Approved:

By the Office of the Attorney General of Texas

---

Attorney General or Designee

Outside Counsel Contract  
Page 14 of 16

## **OUTSIDE COUNSEL CONTRACT**

**OAG Contract No.** \_\_\_\_\_

### **Addendum A**

#### **Services**

Description of Legal Services to be provided:

[Description]

## OUTSIDE COUNSEL CONTRACT

OAG Contract No. \_\_\_\_\_

### Addendum B

#### Rates

The hourly rate or rate range for attorneys, paralegals, patent agents, and others working on Agency matters:

**Name(s) of Lead Counsel:**

For lead counsel, provide documentation of good standing with the relevant licensing authority.

**Named Individual or Timekeeper Classification**

**Hourly Rate or Rate Range**

Attorney - Partner  
Attorney - Of Counsel  
Attorney - Associate  
Paralegal  
Patent Agent

Other (describe)

**Billing Period.** The billing period for this OCC shall be: [ex. monthly, quarterly, etc. ]

**Travel Rate.** The rate for travel time for each attorney traveling for Agency matters will be listed below. An attorney's travel rate may not exceed half of that attorney's hourly rate listed above. If a travel rate(s) is not listed below, Outside Counsel may not charge Agency for time spent traveling on Agency matters.

## Attachment D

### New Request for Voucher Approval Form



**REQUEST FOR VOUCHER APPROVAL**

Submit this to: OCCInvoice@texasattorneygeneral.gov

AGENCY/UNIVERSITY \_\_\_\_\_

OUTSIDE COUNSEL (Law Firm) \_\_\_\_\_

OAG Contract No. \_\_\_\_\_ Contract Term \_\_\_\_\_

Contract Cap Amount \_\_\_\_\_

**AMOUNTS REQUESTED**

Date Agency Received Correct and Complete Invoice \_\_\_\_\_

Invoice Number(s) \_\_\_\_\_

Billing Period of Services \_\_\_\_\_

How much, if any, will be paid with funds not appropriated to the agency from the General Appropriations Act? \_\_\_\_\_

**Legal Fees (per timekeeper). Attach an extra page if more than 6 timekeepers are reported.**

Initials of Timekeeper & Job Title	Hours Worked	Hourly Rate	Total Dollars-Per Timekeeper
1.			
2.			
3.			
4.			
5.			
6.			
<b>TOTAL AMOUNT of all LEGAL FEES</b>	n/a	n/a	

**OR – If Legal Fees Are Set By A Fixed Fee.**

Type of Project/Matter	Number of Project/Matter	Total Dollars – Per Project/Matter
1.		
2.		

**TOTAL AMOUNT of all EXPENSES** \_\_\_\_\_

**TOTAL AMOUNT (All Legal Fees and Expenses) Requested** \_\_\_\_\_

**EXCLUDING THIS VOUCHER APPROVAL, TOTAL AMOUNT of all Legal Fees and Expenses, PAID TO DATE (All Legal Fees and Expenses)** \_\_\_\_\_

**AGENCY VERIFICATION -The Chief Administrative Officer of the Agency or Designee hereby certifies that:**

- (1) The legal services contained in the Invoice were performed and were reasonable and either necessary or advisable;
- (2) The legal services contained in the Invoice were performed within the term and scope of services of the Outside Counsel Contract;
- (3) The legal billing rates are the same as those set in the Outside Counsel Contract;
- (4) Any expense that requires the Agency's pre-approval was in fact pre-approved; and
- (5) The total amount of the Invoice, along with all prior payments made to Outside Counsel under the Outside Counsel Contract do not exceed the maximum liability amount as set in the Outside Counsel Contract.

Name & Title \_\_\_\_\_

Date \_\_\_\_\_ Email Address \_\_\_\_\_

**OAG INTERNAL USE ONLY**

Approval to Pay: \_\_\_\_\_ Initials: \_\_\_\_\_  
Comments: \_\_\_\_\_

# Attachment E

## Amendment Templates

AMENDMENT TO OUTSIDE COUNSEL CONTRACT

OCC No. \_\_\_\_\_

WHEREAS, the [AGENCY] and [OUTSIDE COUNSEL] wish to amend Section(s) \_\_\_\_ of the  
Outside Counsel Contract by [describe amendment].

IT IS UNDERSTOOD AND AGREED AS FOLLOWS:

Section \_\_ of the Outside Counsel Contract is amended to \_\_\_\_\_.

The Outside Counsel Contract in all other respects is ratified and confirmed.

**AGENCY**

**OUTSIDE COUNSEL**

\_\_\_\_\_  
[Authorized Signatory]  
[Title]  
[Agency Name]

\_\_\_\_\_  
[Authorized Signatory]  
[Title]  
[Firm Name]

**Date:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**APPROVED:**

**OFFICE OF THE ATTORNEY GENERAL**

\_\_\_\_\_  
**ATTORNEY GENERAL OR DESIGNEE**

**AMENDMENT TO OUTSIDE COUNSEL CONTRACT**  
**OAG CONTRACT NO. \_\_\_\_\_**

**THIS CONTRACT AMENDMENT** is made and entered into by and between the \_\_\_\_\_, hereinafter referred to as "Agency," and \_\_\_\_\_, hereinafter referred to as "Outside Counsel." The parties hereto severally and collectively have agreed and by the execution hereof are bound to the mutual obligations and performance of the tasks hereinafter described.

**INDUCEMENTS**

**Whereas**, the Agency and the Outside Counsel agreed to and executed that certain Outside Counsel Contract identified by the Outside Counsel Contract Number referenced above, hereinafter the "Original Contract."

**Whereas**, the Agency and the Outside Counsel desire to amend and or modify, alter, excise or add certain terms, conditions and/or mutual covenants of the Original Contract as set forth hereinafter.

**Whereas**, the Agency and the Outside Counsel intend to create a new contract consisting of the new amended and or modified, altered, excised or added terms, conditions and/or mutual covenants of this Amendment to the Outside Counsel Contract and the remaining unchanged provisions of the Original Contract.

**NOW, THEREFORE**, in consideration of the inducements, mutual covenants and conditions herein contained, the parties agree as follows:

**SECTION 1. MODIFICATIONS/AMENDMENTS**

*[The amended section, subsection or Addendum should be completely restated]*

**SECTION 2. ENTIRE AGREEMENT**

The entire agreement between the Agency and the Outside Counsel consists of the new amended and or modified, altered, excised or added terms, conditions and/or mutual covenants of this Amendment to the Outside Counsel Contract and the remaining unchanged provisions of the Original Contract. No prior agreement or understanding, oral or otherwise, of the parties or their agents will be valid or enforceable unless embodied in this contract.

**In Witness Whereof, the Parties Have Signed and Executed this Contract.**

**AGENCY**

**OUTSIDE COUNSEL**

\_\_\_\_\_  
[Authorized Signatory]

[Title]

[Agency Name]

\_\_\_\_\_  
[Authorized Signatory]

[Title]

[Firm Name]

**Date:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**APPROVED:**

**OFFICE OF THE ATTORNEY GENERAL**

\_\_\_\_\_  
**ATTORNEY GENERAL OR DESIGNEE**

City of El Paso v. Public Utility Com'n of Texas, 916 S.W.2d 515 (1995)  
Util. L. Rep. P 26,525, Util. L. Rep. P 26,483

KeyCite Yellow Flag - Negative Treatment  
Disagreed With by Hong v. Bennett, Tax.App.-Fort Worth, November  
22, 2006

916 S.W.2d 515  
Court of Appeals of Texas,  
Austin.

CITY OF EL PASO, Appellant,  
v.  
PUBLIC UTILITY COMMISSION OF TEXAS  
and El Paso Electric Company, Appellees.

No. 03-94-00250-CV.

Aug. 16, 1995.

Order Withdrawing Judgment March 13, 1996.

#### Synopsis

City sought judicial review of Public Utility Commission (PUC) order determining expenses electric utility and city should recover for costs city and utility incurred in litigating two prior Commission rate case dockets concerning prudence of utility's investment in nuclear power plant and sale and leaseback of unit of plant. The District Court, Travis County, 331st Judicial District, Paul R. Davis, Jr., J., affirmed. City appealed. The Court of Appeals, Aboussie, J., held that: (1) assuming utility failed to follow evidentiary procedural requirements set out in hearings examiner's order, that fact, in itself, did not indicate that Commission erroneously failed to apply strict-scrutiny review to evidence or that evidence did not support conclusion that costs were reasonable and necessary; (2) utility cost reimbursement was supported by substantial evidence; (3) fact that evidence before hearings examiner on remand from Commission, by itself, was inadequate to establish reasonableness of utility's prudence audit expenses did not result in Commission failing to hold utility accountable for its burden of proof; and (4) substantial evidence supported Commission's disallowance of portion of hourly charge requested for assistant city attorney's services respecting costs that were not out-of-pocket costs.

Trial court judgment vacated and cause dismissed in accord with settlement agreement.

#### West Headnotes (23)

##### [1] Administrative Law and Procedure

Substantial evidence

In conducting substantial-evidence review of administrative agency decision, Court of Appeals must first determine whether evidence as a whole is such that reasonable minds could have reached conclusion that agency must have reached to take disputed action.

1 Cases that cite this headnote

##### [2] Administrative Law and Procedure

Record

Administrative Law and Procedure

Wisdom, judgment or opinion

In conducting substantial-evidence review of administrative agency decision, Court of Appeals may not substitute its judgment for that of agency and may consider only record on which agency based its decision.

Cases that cite this headnote

##### [3] Administrative Law and Procedure

Burden of showing error

For purposes of substantial-evidence review of administrative agency decision, appealing party bears burden of demonstrating lack of substantial evidence.

Cases that cite this headnote

##### [4] Administrative Law and Procedure

Substantial evidence

For purposes of substantial-evidence review of administrative agency decision, appealing party cannot meet burden of demonstrating lack of substantial evidence merely by showing that evidence preponderates against agency decision.

2 Cases that cite this headnote

**City of El Paso v. Public Utility Com'n of Texas, 916 S.W.2d 515 (1995)**

Util. L. Rep. P 26,525, Util. L. Rep. P 26,483

**[5] Administrative Law and Procedure**

— Substantial evidence

In conducting substantial-evidence review of administrative agency decision, if substantial evidence would support either affirmative or negative findings, Court of Appeals must uphold agency decision and resolve any conflicts in favor of agency decision.

1 Cases that cite this headnote

**[6] Electricity**

— Proceedings before commissions

Assuming that electric utility failed to follow evidentiary procedural requirements set out in hearings examiner's order in proceeding in which Public Utility Commission (PUC) issued order determining expenses electric utility should recover for costs it incurred in litigating two prior Commission rate case dockets, that fact, in itself, did not indicate that Commission erroneously failed to apply strict-scrutiny review to evidence or that evidence did not support conclusion that costs were reasonable and necessary; examiner's order only offered guidelines constituting nothing more than suggestions for type and extent of testimony and other evidence Commission might expect in support of request for reimbursement of rate case expenses. <sup>15</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

Cases that cite this headnote

**[7] Administrative Law and Procedure**

— Weight and sufficiency

**Public Utilities**

— Review and determination in general

State agency like Public Utility Commission (PUC) is judge of weight to be accorded evidence before it.

Cases that cite this headnote

**[8] Public Utilities**

— Operating expenses

Public Utility Commission (PUC) has broad discretion to determine which of public utility's requested rate case expenses should be allowed. <sup>15</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

1 Cases that cite this headnote

**[9] Public Utilities**

— Proceedings Before Commissions

Public Utility Commission (PUC) has discretion to proceed on ad hoc basis in its attempts to define proper standards to apply to cases where it has not had sufficient experience.

Cases that cite this headnote

**[10] Electricity**

— Proceedings before commissions

Public Utility Commission (PUC) order determining expenses electric utility should recover for costs it incurred in litigating two prior Commission rate case dockets was supported by substantial evidence, despite fact that consultant affidavits respecting their work on prior dockets did not include itemized statements of hours worked or hourly rates charged but included only sworn affirmances that hours worked and rates charged were reasonable; there was evidence of nature and complexity of prior docket cases, responsibilities attorneys and consultants assumed, and amount of money charged for attorney and consultant services.

<sup>15</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

1 Cases that cite this headnote

**[11] Public Utilities**

— Operating expenses

Public utility's requested rate case expenses will be reimbursed if Public Utility Commission (PUC) finds them to be



City of El Paso v. Public Utility Com'n of Texas, 916 S.W.2d 515 (1995)  
Util. L. Rep. P 26,525, Util. L. Rep. P 26,483

reasonable. <sup>12</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

Cases that cite this headnote

[12] Electricity

- Proceedings before commissions

City's agreement to submit affidavits in lieu of live testimony was not tantamount to stipulation that all affidavits proffered were admissible in proceeding in which Public Utility Commission (PUC) issued order determining expenses electric utility should recover for costs it incurred in litigating two prior Commission rate case dockets.

<sup>13</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

Cases that cite this headnote

[13] Electricity

- Judicial review and enforcement

City waived its right to object on appeal to admissibility of consultant affidavits on basis of hearsay in proceeding in which Public Utility Commission (PUC) issued order determining expenses electric utility should recover for costs it incurred in litigating two prior Commission rate case dockets; parties contemplated filing of affidavits to reduce expenses of having consultants testify, parties provided mechanism to remedy admission of hearsay if opposing party so objected, and parties contemplated from the outset that consultant affidavits could, in effect, contain hearsay. <sup>14</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a); V.T.C.A., Civil Practice & Remedies Code § 18.001(c).

Cases that cite this headnote

[14] Electricity

- Proceedings before commissions

Assuming statute governing affidavit concerning cost and necessity of services applied to administrative agency proceeding, consultant affidavits would still have been

admissible in proceeding in which Public Utility Commission (PUC) issued order determining expenses electric utility should recover for costs it incurred in litigating two prior Commission rate case dockets, despite contention that affidavits were hearsay; statute did not address admissibility of affidavit concerning cost and necessity of services, but only sufficiency of affidavit to support finding of fact that charge was reasonable or service was necessary. Vernon's Ann.Texas <sup>15</sup> art. 1446c, § 39(a); V.T.C.A., Civil Practice & Remedies Code §§ 18.001, 18.001(b, c).

2 Cases that cite this headnote

[15] Affidavits

- Use in evidence

Statute governing affidavit concerning cost and necessity of services does not address admissibility of affidavit concerning cost and necessity of services, but only sufficiency of affidavit to support finding of fact that charge was reasonable or service was necessary. V.T.C.A., Civil Practice & Remedies Code §§ 18.001, 18.001(b).

2 Cases that cite this headnote

[16] Electricity

- Judicial review and enforcement

Fact that evidence before hearings examiner on remand from Public Utility Commission (PUC), by itself, was inadequate to establish reasonableness of electric utility's prudence audit expenses did not result in Commission failing to hold utility accountable for its burden of proof in proceeding in which Commission issued order determining expenses utility should recover for costs it incurred in litigating two prior Commission rate case dockets concerning prudence of utility's investment in nuclear power plant and sale and leaseback of unit of plant; remand evidence that Commission ordered merely confirmed that underlying documentation already referred to and sworn

**City of El Paso v. Public Utility Com'n of Texas, 916 S.W.2d 515 (1995)**

Util. L. Rep. P 26,525, Util. L. Rep. P 26,483

to in consultants' affidavits in original hearing actually existed, and bore simply on mathematical accuracy of requested expenses.

<sup>124</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

Cases that cite this headnote

**[17] Electricity**

— Judicial review and enforcement

By failing to timely object to electric utility's spreadsheet exhibits when they were offered as evidence into agency record, city waived any objections to form of evidence introduced before hearings examiner on remand from Public Utility Commission (PUC) in proceeding in which Commission issued order determining expenses utility should recover for costs it incurred in litigating two prior Commission rate case dockets. <sup>125</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 39(a).

1 Cases that cite this headnote

**[18] Electricity**

— Proceedings before commissions

In determining expenses city should recover for costs it incurred in litigating two prior Commission electric utility rate case dockets concerning prudence of utility's investment in nuclear power plant and sale and leaseback of unit of plant, substantial evidence supported Public Utility Commission's (PUC) disallowance of portion of hourly charge requested for assistant city attorney's services respecting costs that were not out-of-pocket costs, despite contention that reasonableness of disallowed costs was un rebutted, <sup>126</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 24(a).

Cases that cite this headnote

**[19] Electricity**

— Proceedings before commissions

City had burden to prove reasonableness of its electric utility rate case expenses, and none of other parties had obligation to disprove reasonableness of city's rate case expense reimbursement request, in proceeding in which Public Utility Commission (PUC) issued order determining expenses city should recover for costs it incurred in litigating two prior Commission electric utility rate case dockets. <sup>127</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 24(a).

1 Cases that cite this headnote

**[20] Public Utilities**

— Operating expenses

For purposes of statute governing reimbursement of municipality for its public utility rate case expenses, reimbursement contemplates actual expenditure. <sup>128</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 24(a).

Cases that cite this headnote

**[21] Electricity**

— Proceedings before commissions

In determining expenses city should recover for costs it incurred in litigating two prior Commission electric utility rate case dockets, Commission was not required to accept city's conclusion of what was reasonable and award it amount in excess of actual costs.

<sup>129</sup> Vernon's Ann.Texas Civ.St. art. 1446c, § 24(a).

1 Cases that cite this headnote

**[22] Costs**

— Duties and proceedings of taxing officer

Reasonableness of attorney fees is question of fact.

Cases that cite this headnote

**[23] Administrative Law and Procedure**

— Substantial evidence

**City of El Paso v. Public Utility Com'n of Texas, 916 S.W.2d 515 (1995)**  
Util. L. Rep. P 26,525, Util. L. Rep. P 26,483

In reviewing administrative agency fact findings, Court of Appeals will affirm agency decision if substantial evidence supporting agency action exists in record.

Cases that cite this headnote

#### Attorneys and Law Firms

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Kerry McGrath, Clark, Thomas, & Winters, Austin, Dan Morales, Attorney General, for El Paso Electric.

Liz Bills, Assistant Attorney General, Energy Division, Austin, for Public Utility Commission.

Before CARROLL, C.J., and ABOUSSIE and JONES, JJ.

#### Opinion

ABOUSSIE, Justice.

The City of El Paso brings this suit for judicial review of an order of appellee Public Utility Commission of Texas (the "Commission") in Docket No. 8018. See *Tex. Public Util. Comm'n, Inquiry into the Rate Case Expenses of El Paso Electric Company and the City of El Paso in Docket Nos. 7460 and 7172*, Docket No. 8018, 17 *Tex. P.U.C. Bull.* 545 (Sept. 20, 1991). In Docket No. 8018, the Commission determined the expenses appellee El Paso Electric Company ("El Paso Electric") and the City should recover from ratepayers for the costs El Paso Electric and the City incurred in litigating two prior Commission dockets. The City contends that the Commission should have disallowed some of El Paso Electric's requested expenses and should have allowed the City to recover a greater amount for its expenses. The district court affirmed the Commission's order. \*519 We will affirm the judgment of the district court.

#### FACTUAL AND PROCEDURAL BACKGROUND

The Commission established Docket No. 8018 in 1988 to determine El Paso Electric's and the City's reasonable

and necessary expenses in litigating issues ("rate case expenses") before the Commission in Docket Nos. 7460 and 7172. See *Tex. Public Util. Comm'n, Application of El Paso Electric Company for Authority to Change Rates and Application of El Paso Electric Company for Review of the Sale and Leaseback of the Palo Verde Nuclear Generating Station Unit 2*, Docket Nos. 7460 & 7172, 14 *Tex. P.U.C. Bull.* 929, 1206 (June 18, 1988).<sup>1</sup> It is undisputed that the Public Utility Regulatory Act ("PURA")<sup>2</sup> permits public utilities and municipalities to recover those expenses that the Commission finds reasonable. See PURA, <sup>3</sup>*Tex. Rev. Civ. Stat. Ann.* art. 1446c, §§ 24(a), <sup>4</sup>39(a) (West Supp.1995).<sup>3</sup>

At a prehearing conference, the parties discussed methods of proving expenses and their reasonableness in the least burdensome and costly manner. Instead of using live testimony, the parties agreed to file affidavits of consultants well in advance of the hearing; if necessary, individual consultants would be available at the hearing for cross-examination. Examiner's Order No. 3 outlined the guidelines discussed at the prehearing conference for the offering of sufficient proof at the hearing. Most notably, the examiner observed that rate case expenses are subject to a strict-scrutiny standard of review: "[T]he Commission must be able to determine that the rate case expenses have been properly scrutinized and that the evidence is sufficient to support the recommendations in the Examiner's Report." The examiner also suggested that invoices and other supporting documentation for rate case expenses not be included as exhibits to testimony or affidavits, but be made available in discovery. Instead, the examiner suggested that the testimony of each witness offered to support rate case expenses should expressly state that the witness informally audited invoices and other documentation, and based on his or her review of the documentation, the witness should affirm that: (1) the individual charges and rates were reasonable as compared to usual charges for such services; (2) the amount of each service was reasonable; (3) the calculation of charges was correct; (4) no double billing of charges occurred; (5) no charges had already been recovered through \*520 reimbursement for other expenses; (6) no charges should have been assigned to other jurisdictions; and (7) any allocation of charges between jurisdictions was reasonable.

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Following a four-day hearing on the merits, the hearings examiner, in a report revised to correct previous miscalculations, recommended that El Paso Electric be allowed \$10,758,627 and the City be allowed \$1,104,405 as rate case expenses. The recommendation disallowed portions of expense reimbursement requested by both parties. The Commission remanded the proceedings to the hearings examiner to determine if underlying documentation supporting an award of \$7,109,551 to El Paso Electric for expenses for a prudence audit of the Arizona Nuclear Power Project (the "ANPP")<sup>4</sup> existed in the form required by Examiner's Order No. 3.

In the hearing on remand, El Paso Electric made available additional documentation of its prudence audit expenses and filed spreadsheets summarizing those documents. After the hearing, the hearings examiner advised the Commission that underlying documentation which supported reimbursement of the \$7,109,551 existed. The Commission's final order adopted the revised recommendations of the hearings examiner, including the \$7,109,551 award to El Paso Electric. The City sought judicial review of the Commission's order in the district court. See Administrative Procedure Act, Tex. Gov't Code Ann. § 2001.171 (West 1995); PURA, §§ 24(b), 69 (West Supp.1995). The district court affirmed the Commission's order. The City appeals from that judgment, contending that the Commission should have disallowed some of El Paso Electric's requested rate case expenses and should have allowed the City to recover a greater amount for its rate case expenses.

## DISCUSSION

### I. Prudence Audit Expenses

In its first point of error, the City contends that the district court erred by affirming the Commission's order allowing El Paso Electric to recover costs that were not supported by substantial evidence in the form the Commission required. Specifically, the City asserts that El Paso Electric failed to present any evidence to support its claim that the expenses of \$7,109,551 the ANPP charged El Paso Electric for the prudence audit ("prudence audit expenses") were reasonable and necessary.

[1] [2] [3] [4] [5] In conducting a substantial numbers had been effective. Samson acknowledged that evidence review, we must first determine whether the he had not verified the reasonableness of the costs El Paso evidence as a whole is such that reasonable minds could

have reached the conclusion the agency must have reached in order to take the disputed action. *Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116 (Tex.1988), cert. denied, 490 U.S. 1080, 109 S.Ct. 2100, 104 L.Ed.2d 662 (1989); *Texas Health Facilities Comm'n v. Charter Medical Dallas, Inc.*, 665 S.W.2d 446, 453 (Tex.1984). We may not substitute our judgment for that of the agency and may consider only the record on which the agency based its decision. *Sizemore*, 759 S.W.2d at 116. The appealing party bears the burden of demonstrating a lack of substantial evidence. *Charter Medical*, 665 S.W.2d at 453. The appealing party cannot meet this burden merely by showing that the evidence preponderates against the agency decision. *Id.* at 452. If substantial evidence would support either affirmative or negative findings, we must uphold the agency decision and resolve any conflicts in favor of the agency decision. *Auto Convoy Co. v. Railroad Comm'n*, 507 S.W.2d 718, 722 (Tex.1974).

## The Evidence

At the initial hearing, El Paso Electric introduced testimony from Ivor Samson, an \*521 attorney who based his conclusions on his experience as lead attorney in a California case concerning the prudence of nuclear power plant expenses and his general familiarity with similar cases. Samson's testimony was offered to establish that the *efforts* El Paso Electric took to demonstrate prudence were reasonable. Samson reviewed El Paso Electric's actions in preparing evidence of prudence for hearings, including the company's cost-sharing arrangements allowing it to "piggyback" on the efforts of other co-owners of the ANPP; he concluded this method was "more cost effective, less duplicative and the only practicable way" for a comparatively small utility like El Paso Electric to have prepared the comprehensive testimony necessary to demonstrate prudence to the Commission. Samson also reviewed the reasonableness of the consultant efforts and charges for the establishment of prudence. He testified that although some of the hourly consultant charges were quite expensive, the rates were "simply a reflection of the marketplace" and that the specific measures used to control consultant costs and numbers had been effective. Samson acknowledged that he had not verified the reasonableness of the *costs* El Paso

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Electric incurred in the rate case proceedings as far as the prudence audits were concerned.

El Paso Electric also introduced testimony from Raymond Hobbs, a representative of the Arizona Public Service Company, who was responsible for coordinating the monitoring of costs incurred in the prudence audits and the verification of the accuracy of costs charged to El Paso Electric. Hobbs testified about the specific steps taken to insure the accuracy and reasonableness of costs charged to El Paso Electric: he discussed budgeting processes that addressed needs, resources available to meet those needs, costs, and time constraints. He also discussed invoice verification procedures to ensure that services rendered were technically and professionally satisfactory and that duplicate billings and inadvertent over-expenditures did not occur. He testified about accounting procedures used and affirmed the mathematical accuracy of those procedures. Hobbs also explained two exhibits summarizing and breaking down El Paso Electric's costs into categories such as consultant, legal, and contractor costs; the summaries include invoice logs detailing costs allocated to El Paso Electric for prudence audit expenses. Hobbs additionally testified about steps taken to ensure cost-effective use of consultants. On cross-examination, Hobbs testified that he had an opportunity to review, to his knowledge, every invoice submitted by consultants to satisfy himself of the accuracy of costs and had reviewed all costs presented for reimbursement. Hobbs concluded that the costs El Paso Electric incurred were reasonable and properly supported in the sense that they were mathematically accurate.

El Paso Electric additionally introduced affidavits from numerous consultants involved in the prudence audits whose expenses El Paso Electric included in its reimbursement request. The affidavits identified the type and scope of the consultants' work and conformed with the guidelines contained in Examiner's Order No. 3 by indicating that the affiant had informally audited the invoices related to the proceeding and affirmed that the charges and rates were reasonable, the amount of each service was reasonable, the calculation of charges was correct, there was no double billing, and that none of the charges were recovered through reimbursement for other expenses. El Paso Electric also introduced the affidavit of George Lyons, an attorney, which discussed the legal services his law firm performed for El Paso Electric during the audits and the services of eight of the consultants

whose affidavits had not been prepared in time for filing before the hearing in Docket No. 8018. El Paso Electric did not submit an affidavit that itemized the number of hours the individual consultants worked or the hourly rates charged.

On remand to the hearings examiner, El Paso Electric offered into the record without objection two exhibits of spreadsheets listing the hourly rates and number of hours charged for each consultant or attorney who worked on the prudence issues or audits. The exhibits were created from information contained in seventeen banker's boxes, sixteen of which were available in the hearing room during the remand hearing.

#### \*522 The City's Substantial Evidence Challenges

##### Initial Hearing

[6] [7] [8] [9] The City challenges El Paso Electric's evidence of the reasonableness and necessity of its costs incurred during the prudence audits on several grounds. First, the City asserts that because all the evidence El Paso Electric presented regarding costs of the prudence audits was not in the form designated in Examiner's Order No. 3, the Commission, by concluding that El Paso Electric's costs were reasonable and necessary, failed to enforce its own strict-scrutiny standard and its conclusion is thus not supported by substantial evidence. Assuming without deciding that El Paso Electric failed to follow the evidentiary procedural requirements set out in Examiner's Order No. 3, we conclude that this fact, in itself, does not indicate that the Commission erroneously failed to apply strict-scrutiny review to the evidence or that the evidence does not support a conclusion that the costs were reasonable and necessary. A state agency like the Commission is the judge of the weight to be accorded evidence before it. *Southern Union Gas Co. v. Railroad Comm'n*, 692 S.W.2d 137, 141 (Tex.App. Austin 1985, writ rel'd n.r.e.); see *Gulf States Utils. Co. v. Public Util. Comm'n*, 841 S.W.2d 459, 474 (Tex.App.—Austin 1992, writ denied). The Commission thus has broad discretion to determine which requested expenses should be allowed. In any event, Examiner's Order No. 3 acknowledges that it only offered "guidelines" constituting "nothing more than suggestions for the type and extent of testimony and other evidence the Commission may expect in support of request for reimbursement of rate case expenses."<sup>5</sup> The City's



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substantial evidence challenge on this ground is without merit.

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[10] [11] The City next submits that the Commission's decision is not supported by substantial evidence because the Commission failed to consider its own identified factors in determining the reasonableness of requested expenses constituting legal and consulting fees. A utility's requested rate case expenses will be reimbursed if the Commission finds them to be reasonable. See PURA § 39(a) (providing for utility rates to be set at levels allowing utility to recover its "reasonable and necessary operating expenses"). However, neither PURA nor Texas case law defines "reasonable" as it should be applied to the Commission's review of requested rate case expenses in the form of consulting and legal fees. The Commission thus argues that its determination of reasonableness is analogous to the trial court's determination of the reasonableness of attorney's fees and costs of litigation and includes consideration of factors like: (1) time and labor required; (2) nature and complexities of the case; (3) amount of money or value of property or interest at stake; (4) extent of responsibilities the attorney assumes; (5) whether the attorney loses other employment because of the undertaking; and (6) benefits to the client from the services. See *Nguyen Ngoc Giao v. Smith & Lamm*, P.C., 714 S.W.2d 144, 148-49 (Tex.App.—Houston [1st Dist.] 1986, no writ). The City does not disagree with the Commission's attorney's fees analogy, but instead argues that El Paso Electric failed to present evidence of the identified *Smith & Lamm* factors or of usual or customary fees, see Tex.Civ.Prac. & Rem.Code Ann. §§ 38.001, .003 (West 1986), and that the Commission abused its discretion by determining reasonableness without considering any of the identified factors.

Even assuming that the *Smith & Lamm* factors govern the Commission's determination of reasonableness of requested expenses, we note that these are only factors "to be considered." 714 S.W.2d at 148. Thus, we recognize that the Commission may consider other factors in addition to or in place of the *Smith & Lamm* factors. Nevertheless, contrary to the City's assertion, the agency record contains some evidence of the *Smith & Lamm* factors, including, but not limited to, the nature and complexity of the two prior docket cases, the responsibilities attorneys and consultants assumed, and the amount of \*523 money charged for attorney and

consultant services. Since the record contains evidence of some *Smith & Lamm* factors, we cannot say, without indication to the contrary, that the Commission abused its discretion by failing to consider those factors or that the Commission's decision is not supported by substantial evidence because the Commission failed to consider those factors.

Looking at the agency record evidence from the initial hearing as a whole, we conclude that reasonable minds could have reached the same conclusion as the Commission in regard to the reasonableness of the requested prudence audit fees. Substantial evidence of the reasonableness of the fees exists in the form of Samson's expert testimony that El Paso Electric's prudence efforts were reasonable (i.e., that the amount of services provided was reasonable), Hobb's testimony that the prudence audit costs were carefully budgeted, monitored, and verified, and consultant affidavit testimony that consultant services were performed, that charges related to those services as well as the amount of services were reasonable, and that charges were correctly calculated.

[12] The City maintains that the consultant affidavits are not substantial evidence of reasonableness of costs because they are hearsay<sup>6</sup> not in compliance with section 18.001(c) of the Civil Practice and Remedies Code. See Tex.Civ.Prac. & Rem.Code Ann. § 18.001(c) (West 1986). El Paso Electric, admitting at the initial hearing that the consultant affidavits are hearsay, contends that the parties intended the affidavits to be hearsay. As such, El Paso Electric submits that the City, by agreeing to the presentation of proof by affidavits, waived any objection to that procedure. At the prehearing conference, the City's attorney stated:

I'm trying to minimize expenses ... whereby we submit that [outside consultant] information by affidavit which, with the agreement of the parties, can become part of the record and that information can be there sufficiently in advance of the hearing so that if a particular party has some difficulty with the statements or the information contained therein or ... [the hearing examiner] wants to examine that particular individual or someone on those particular bills, we can set that up for the hearing. If we file those in advance and get it before everybody—otherwise, they can be admitted—

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that would be, I would think, a preferable procedure and save expense.

The City responds to El Paso Electric's waiver argument by stating that it could not anticipate that El Paso Electric would attempt to submit inadmissible affidavits; it claims that its agreement to submit affidavits in lieu of live testimony is not tantamount to a stipulation that all affidavits proffered are admissible. We agree. Regardless of the procedures the parties agreed to in regard to the filing of affidavits, some of the affidavits may still have been inadmissible. Upon timely objection on proper grounds, the City could have preserved its argument that the Commission should not have considered the affidavits.

[13] Nevertheless, we conclude that the City waived its right to object to the admissibility of the affidavits on the basis of hearsay. Although Examiner's Order No. 3 does not specifically refer to the procedures for admitting affidavits into the agency record, the prehearing conference offers insight into the parties' intentions in regard to the affidavits. As illustrated in the excerpt quoted above, the parties clearly contemplated the filing of affidavits to reduce the expenses of having the consultants testify. As such, the possibility existed that some affidavits could contain hearsay statements. The parties provided a mechanism to remedy the admission of hearsay if an opposing party so objected: if a party decided cross-examination of an individual consultant was necessary, that consultant would appear at the hearing. The hearings examiner summarized the affidavit procedure in its report to the Commission:

At the May 31, 1988, prehearing conference, the parties discussed the possibility \*524 of using affidavits instead of live testimony. It was decided to set up a procedure whereby the consultant's (sic) who participated in either the prudence case or the rate case would file affidavits well in advance of the hearing. If a party decided it was necessary to cross-examine the individual consultant then that consultant would be brought to the hearing.... All the parties agreed to this procedure.

Because the parties contemplated from the outset that the consultant affidavits could, in effect, contain hearsay, we conclude the City cannot complain about the inadmissibility of the affidavits on hearsay grounds.

[14] [15] However, even if the City did not waive its right to make a hearsay objection, and assuming section 18.001 of the Civil Practice and Remedies Code applies to an agency proceeding, the affidavits would still be admissible over the City's particular objection. Section 18.001 does not address the *admissibility* of an affidavit concerning cost and necessity of services but only the *sufficiency* of the affidavit to support a finding of fact that a charge was reasonable or a service was necessary. Section 18.001 provides in pertinent part:

[A]n affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is *sufficient evidence to support a finding of fact* by judge or jury that the amount charged was reasonable or that the service was necessary.

Tex.Civ.Prac. & Rem.Code Ann. § 18.001(b) (West 1986) (emphasis added). Moreover, in order to constitute sufficient evidence, the affidavit must: (1) be taken by an officer with authority to administer oaths; (2) be made by the provider of the service or the person in charge of records showing the service provided and the charge made; and (3) include an itemized statement of the service and charge, *Id.* § 18.001(c). Section 18.001 makes no reference to requirements for admissibility of affidavits.

We conclude that even though the consultant affidavits did not include itemized statements of hours worked or hourly rates charged but included only sworn affirmances that the hours worked and rates charged were reasonable, substantial evidence still exists to support the Commission's order allowing El Paso Electric's prudence audit expenses.

*On Remand*



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[16] The City also asserts substantial evidence challenges to the remand proceedings. The City contends that the evidence on remand was totally lacking in probative value to establish the reasonableness of El Paso Electric's prudence audit expenses and that the Commission thus failed to hold El Paso Electric accountable for its burden of proof. We agree with the City that, by itself, the remand evidence is inadequate to establish the reasonableness of El Paso Electric's prudence audit expenses. However, the City acknowledges that the remand did not provide for additional presentation on the issue of reasonableness; the examiner concluded that the question of whether El Paso Electric's requested prudence audit expenses were reasonable and necessary was outside the scope of the remand.

Even though El Paso Electric's remand evidence did not establish reasonableness, the Commission did not fail to hold El Paso Electric accountable for its burden of proof. The agency record from the initial hearing contains substantial evidence to establish the reasonableness of El Paso Electric's requested prudence audit expenses in the amount of \$7.1 million. In addition, the remand evidence was effectively before the Commission in the initial hearing. On remand, El Paso Electric produced boxes of invoices and other documentation available through discovery and filed as exhibits spreadsheets summarizing the documentation contained in the boxes. The spreadsheets listed the hourly rates and number of hours charged by each consultant or attorney who worked on the prudence case. The information summarized in the spreadsheets is directly referred to in each consultant affidavit, which affirms that "the individual charges and rates are reasonable" and "the amount of each service is reasonable."

Examiner's Order No. 3 provided that the underlying documentation referred to in the \*525 affidavits should not be included as exhibits to testimony or affidavits because, by itself, the documentation would not substantiate a request for reimbursement. The examiner explained at the prehearing conference: "The invoices and other supporting documentation for the rate case expenses are not in and of themselves demonstrative of the reasonableness of that expense. I think they

probably are very helpful in determining the mathematical accuracy of the requested amounts...." The remand evidence the Commission ordered thus merely confirms that the underlying documentation already referred to and sworn to in the consultants' affidavits actually exists and instead of establishing reasonableness, bears simply on the mathematical accuracy of the requested expenses. The Commission held El Paso Electric to the proper burden of proof.

[17] The City further argues that since the spreadsheets introduced on remand did not exist at the time of the original hearing or at the time of the remand order, they cannot be considered evidence within the meaning of the remand order. However, the City has waived any objections to the form of the evidence introduced on remand because it did not timely object to the spreadsheet exhibits when they were offered as evidence into the agency record.

Because we conclude that the record contains substantial evidence to support the Commission's conclusion that El Paso Electric's requested prudence audit expenses were reasonable and necessary and that the remand hearing did not involve proof of reasonableness nor did it need to, we overrule the City's first point of error.<sup>7</sup>

## II. The City's Disallowed Expenses

[18] [19] In its second point of error, the City asserts that the district court erred by affirming the order of the Commission to the extent that the Commission's order did not allow the City to recover all reasonable costs of its participation in Docket Nos. 7460 and 7172. See PURA § 24(a). Specifically, the City complains that the Commission abused its discretion by limiting the City's recovery for the services of the assistant city attorney to an hourly rate of \$39.54 when there was no evidence that the City's requested reimbursement amount for a \$75 hourly rate was not reasonable.<sup>8</sup>

The hourly rate requested by the City was composed of the following elements:

Salary and Fringe Benefits for Assistant City Attorney Nanette Williams	\$ 36,590
75% of Salary for Ms. Williams's Legal Secretary	17,308

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5% of Salaries of the City Attorney and First Assistant City Attorney	6,100
5% of Administration Costs for Contractual Services and Materials	9,453
Office Space (1/22 of the City's Municipal Building at \$8.50/sq. ft.)	6,375
5% of Overhead Costs	11,611
5% of Annual Cost of Mayor and City Council	23,179
Total Annual Costs	\$110,616

The City divided the annual cost by 1,400 billable hours<sup>9</sup> to obtain an hourly rate of \$79.01. The City then rounded that figure down to a \$75.00 hourly rate. The \$39.54 hourly rate the Commission allowed was based on a disallowance of the City's requests to recover five percent of the annual salaries of the city attorney and first assistant city attorney, \$8.50/sq.ft. for office space allocated to Williams, and five percent of the \*526 annual costs of the mayor and city council. The other elements of the City's request were fully allowed resulting in a total annual cost of \$74,962. The Commission divided that figure by 1,896 annual billable hours, based on eight-hour work days.

[20] The reimbursement allowed limited the City's recovery to its out-of-pocket costs directly attributable to its participation in the case; in other words, the Commission limited the City's recovery to costs actually incurred. PURA provides that municipalities may be reimbursed for the "reasonable costs" of litigation services in ratemaking proceedings. PURA § 24(a).

The Commission has thus interpreted<sup>10</sup> section 24(a) of PURA to allow recovery only for a municipality's "reasonable costs incurred" for litigation services in ratemaking proceedings. We agree with the Commission's interpretation: a reimbursement contemplates an actual expenditure. The examiner's initial report to the Commission explained: "§ Section 24 of PURA ... requires that before rate case expenses can be reimbursed, they must actually be incurred."

[21] [22] [23] The City does not appear to challenge the Commission's determination that some of the costs the City requested were not out-of-pocket costs. Instead, the City challenges the Commission's interpretation of PURA by stating that no Texas cases support the Commission's

determination to disallow its other requested expenses. As support for its argument, the City cites to Texas and federal cases discussing the recovery of reasonable attorney's fees. Assuming the validity of the City's analogy of its disputed expenses to attorney's fees,<sup>10</sup> we note the reasonableness of attorney's fees is a question of fact.

*Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 767 (Tex.App.—Houston [1st Dist.] 1988, writ denied). Consequently, we are constrained by the well-known rules governing our review of agency fact findings: we will affirm the agency decision if substantial evidence supporting the agency action exists in the record.

*Charter Medical*, 665 S.W.2d at 452. We conclude that substantial evidence supports the Commission's award of the City's expenses as calculated. The City's argument that the Commission erred in disallowing some requested expenses since the reasonableness of the disallowed costs was un rebutted is unpersuasive. The law does not require the Commission to accept the City's conclusion of what is reasonable and award it an amount in excess of actual costs. *El Paso Electric Co. v. Public Util. Comm'n*, 903 S.W.2d 425, 441-42 (Tex.App.—Austin 1995, no writ h.) (on rehearing); see PURA § 24(a) (allowing reimbursement for reasonable costs). We overrule the City's second point of error.

## CONCLUSION

Substantial evidence in the record supports the Commission's allowance of El Paso Electric's prudence audit expenses and the disallowance of the City's requested costs that were not incurred during the ratemaking proceedings in Docket Nos. 7460 and 7172. Having

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overruled both of the City's points of error, we affirm the judgment of the district court.

Affirmed.

PER CURIAM.

The parties have filed a joint motion to dismiss. The parties' joint motion is granted in part and overruled in part, Tex.R.App.P. 59(a)(1)(A).

The judgment of this Court, dated August 16, 1995, is withdrawn; the judgment of the trial court is vacated and the cause is dismissed in accord with the settlement agreement of the parties. The opinion of this Court dated August 16, 1995 is not withdrawn.

Judgment Vacated and Cause Dismissed on Joint Motion.

All Citations

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#### Footnotes

- 1 Docket Nos. 7460 and 7172 addressed the prudence of El Paso Electric's investment in Units 1 and 2 of the Palo Verde Nuclear Generating Station, also known as the Arizona Nuclear Power Project, and the propriety of a sale and leaseback of Unit 2. Docket Nos. 7460 and 7172 established rates which included El Paso Electric's "uncontested" rate case expenses. The rate case expenses at issue here were El Paso Electric's contested rate case expenses that were not decided in the two prior dockets and the rate case expenses requested by the City in the two prior dockets but excluded from the final rates set.
- 2 The 74th Legislature recodified PURA, effective April 5, 1995. See Public Util.Regulatory Act of 1995, 74th Leg., R.S., ch. 9, §§ 2-4, 1995 Tex.Sess.Law Serv. 31, 87-88 (West). The recodification constituted a nonsubstantive revision of PURA. See *id.* § 3(a), 1995 Tex.Sess.Law Serv. at 87. The instant cause is governed by the law in effect prior to the recodification, and for sake of convenience we cite to the pre-Code statutory provisions.
- 3 PURA § 39(a), applying to public utilities like El Paso Electric, provides:  
In fixing the rates of a public utility the regulatory authority shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public over and above its reasonable and necessary operating expenses.  
(Emphasis added).  
PURA § 24(a), applying to municipalities like the City, provides:  
The governing body of any municipality participating in or conducting ratemaking proceedings shall have the right to select and engage rate consultants, accountants, auditors, attorneys, engineers, or any combination thereof, to conduct investigations, present evidence, advise and represent the governing body, and assist with litigation in public utility ratemaking proceedings before the governing body, any regulatory authority, or in court. *The public utility engaged in such proceedings shall be required to reimburse the governing body for the reasonable costs of such services to the extent found reasonable by the applicable regulatory authority.*  
(Emphasis added).
- 4 Utilities from the states of California, Arizona, New Mexico, and Texas, including El Paso Electric, owned interests in the ANPP, and in 1984 agreed to bear the costs of an audit of the construction prudence of the ANPP. The costs were incurred in anticipation of prudence hearings before the utilities' respective public utility commissions. The 1984 audit was never completed; El Paso Electric voluntarily withdrew after unilaterally concluding that the audit would be unfairly biased against it. In Docket 8018, El Paso Electric sought to recover its costs incurred during the 1984 audit as well as its expenses for audit procedures it participated in after the dissolution of the 1984 audit.
- 5 The Commission has discretion to proceed on an ad hoc basis in its attempts to define proper standards to apply to cases where it has not had sufficient experience. *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 188-89 (Tex.1994).
- 6 See Tex.R.Civ.Evid. 801. Rules of evidence, as applied in nonjury civil cases in district court, apply to agency contested case proceedings. Administrative Procedure Act, Tex.Gov't Code Ann. § 2001.081 (West 1995).
- 7 Because we conclude substantial evidence exists in the agency record from the initial hearing supporting the Commission's final reimbursement award for El Paso Electric's prudence audit expenses, we do not address the City's other substantial evidence challenges complaining about discovery, the absence of testimony of an attorney from the

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law firm providing services to El Paso Electric for the prudence audit, and the alleged reliance of Commission staff on a Coopers & Lybrand audit instead of reviewing underlying documentation of expenses.

8 We initially note that the City had the burden to prove the reasonableness of its rate case expenses. None of the other parties had an obligation to disprove the reasonableness of the City's request.

9 This figure was calculated based on six-hour work days.

10 We note that technically, PURA § 24 does not authorize a municipality to recover its reasonable attorney's fees, but only reimbursement for its reasonable costs. See PURA § 24(a).

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## **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<sup>1</sup> 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”).<sup>2</sup> 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.

<sup>1</sup> [www.texasattorneygeneral.gov/agency/publications](http://www.texasattorneygeneral.gov/agency/publications)

<sup>2</sup> 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:

<b>Limitation of Liability Amount</b>	<b>Administrative Fee</b>
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.<sup>3</sup> 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.**

<sup>3</sup> [https://www.texasattorneygeneral.gov/files/agency/voucher\\_approval\\_request\\_word.doc](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.<sup>4</sup>

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](mailto: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.

<sup>4</sup> <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.



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

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

From: Office of the Attorney General — General Counsel Division

Date: July 17, 2023

Re: Outside Counsel Contract Rules, Process Changes, and Community System Updates

Pursuant to its statutory duties, the Office of the Attorney General (“OAG”) has adopted administrative rules related to outside counsel contracts for state agencies, university systems, and institutions of higher education (individually “agency” and collectively “agencies”) pursuant to statute.<sup>1</sup> In light of continuing updates made to the processes and procedures governing these contracts, the OAG is taking this opportunity to provide agencies updated direction regarding Outside Counsel Contracts (OCCs), including OCC amendments, invoice submission and approval, and administrative fees. Please note that the guidance in this letter supersedes all previously issued Letters to State Agencies. The OAG reserves the right, under its statutory authority, to revise this document and the policies and procedures it details at any time. The best source for information concerning outside counsel matters (including the latest version of this letter) is the OAG’s website at: [Texas Attorney General, Outside Counsel Contracts](#). Questions which are not answered herein, or in other resources available on the OAG’s website, may be directed to the OAG’s General Counsel Division<sup>2</sup> at: [GCDContracts@oag.texas.gov](mailto:GCDContracts@oag.texas.gov)

**Introductory Notes**

The Attorney General serves as legal counsel for the state and all its 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 any legal services whatsoever from any outside counsel, regardless of the source of funds that would be used to pay for such legal services, or if the services would be provided at no cost, it must first electronically submit to the OAG a Request to Retain Outside Counsel (“RtR”) through the OAG’s online Community system ([Community](#)<sup>3</sup>).

<sup>1</sup> See Tex. Gov’t Code § 402.0212(f).

<sup>2</sup> Those involved with the outside counsel process in the past may recall the division formerly handling these matters was Financial Litigation and Charitable Trusts (FLD or FinLit), but the unit responsible for outside counsel has been absorbed by the General Counsel Division.

<sup>3</sup> The Community User Guide is on our website here: [Community User Guide](#).



Upon receipt of an RtR from an agency through the online Community system, the OAG will review the agency's submission 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, and for compliance with applicable rules and statutes. Within ten (10) business days after receiving the RtR submission, the OAG will notify the agency that the OAG either (1) approves the RtR and will process an OCC for the agency and outside counsel, (2) denies the RtR, or (3) will notify the agency that additional or corrected information or documentation is required to make a determination. Please be aware that in the outside counsel process the OAG is acting primarily as a regulatory body and not as counsel for state agencies; therefore, the OAG is unable to provide legal counsel and advice regarding the specific business terms the agency negotiates with its proposed outside counsel.

Although the OAG generally will not approve any deviation from the OCC template and the policies and procedures detailed in this document, the OAG recognizes that exceptional and compelling circumstances could necessitate changes or exceptions in rare cases. As a result, the OAG reserves the right to make changes to the OCC or grant exceptions to these policies and procedures if the OAG determines, in its discretion, that 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 include comprehensive details about its requested changes in its RtR so that the OAG can evaluate them. The OCC template is updated each biennium to incorporate new applicable legislation and improve efficacy. Agencies should not sign engagement letters with any potential outside counsel as they do not comply with applicable laws, rules, and procedures, and are not compatible with the OAG's contract template.

When an RtR is approved, the OAG will route the resulting OCC electronically via DocuSign for signature by the agency and outside counsel.

### **Requests to Retain Outside Counsel**

There are several requirements in the Community system for submitting an RtR and a summary is provided below.

#### *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. If the agency contact is not an attorney, then 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. Agencies must ensure the information for the designated agency contact and/or the responsible attorney is accurate as long as the RtR is in process and any resulting contract is in place.

*b. University Systems and Institutions of Higher Education Requirement for System-Wide Contracts*

University systems and institutions of higher education may not submit separate RtRs on behalf of the system's or institution's individual member schools or universities. More specifically, the system must submit its RtR(s) where the system is the contracting party, and the terms of the resulting contract encompass the system and all its member schools together. Importantly, this requires the system to request the entire amount of the proposed limitation of liability (maximum contract value) applicable to the system and all its member schools in the RtR.

*c. Start and end dates for Outside Counsel Contracts*

The requested start date for an OCC may be a date in the future, or any date from the date of the RtR's submission to the first day of the calendar month in which the RtR was submitted. For example, an RtR submitted April 30<sup>th</sup> may have a start date of April 1<sup>st</sup>, but an RtR submitted May 1<sup>st</sup> may only have a May 1<sup>st</sup> or later start date. Best practice is to submit RtRs well in advance of a requested start date to allow for complete processing of the request including, if necessary, resolution of any issues with the submission. Any request for a start date earlier than the first day of the month the RtR is submitted would only be permitted if the OAG, in its sole discretion, determined that unusual and compelling circumstances exist.

Requested end dates may be any date within the current fiscal biennium (for example, August 31, 2023). If outside counsel services are needed beyond the end of the biennium, then an RtR for a new contract must be submitted. For certain litigation OCCs, there is a potential exception to allow the OCC to extend to the end of the litigation matter, as determined by the agency in consultation with the OAG. Where the date is indeterminate due to ongoing litigation, it may be acceptable to submit an end date for one or more bienniums in the future (e.g., 8/31/2029 or 8/31/2031).

*d. Guidance for Requested Scopes of Service for Outside Counsel Contracts*

In the RtR, the text entered (or attached) for the proposed Scope of Services *will directly become part of the OCC, in its entirety (as Addendum A)*. The Scope of Services must be narrowly tailored to provide the OAG with enough information to make an informed decision about whether the proposed outside counsel representation is appropriate, while still fulfilling the agency's objectives for the representation. Failure to narrowly tailor the Scope of Services will, at best, result in a delay in processing the RtR, and, at worst, could result in the RtR being rejected. Agencies should draft the Scope of Services carefully to obtain the desired results from the proposed outside counsel representation. Additionally, no single OCC may contain a Scope of Services that permits legal representation across more than one practice area unless each is *clearly related to the central subject matter* of the representation. Accordingly, please ensure the Scope of Services in the RtR is limited to one practice area or is specifically tied to one central subject matter to which one or more practice areas clearly relate.

*e. Documents that Must Accompany Requests to Retain*

When submitting an RtR, agencies must attach: (1) an outside counsel's signed Conflicts Disclosure statement<sup>4</sup>; (2) the agency's Affirmation Statement indicating that it has reviewed the Disclosure statement and is satisfied with its choice of outside counsel notwithstanding anything contained in the Conflicts Disclosure<sup>5</sup>; and (3) documentation of the eligibility of the requested Lead Counsel attorney to practice law in the State of Texas, where required, or in the jurisdiction in which the services will be performed. These documents will be included in the DocuSign routing envelope if an OCC is approved. Any RtR not accompanied by these documents will be automatically rejected by the Community system. Additional information about the specific requirements for these documents is below. The agency may submit additional documents if desired (for example, a biography of the proposed Lead Counsel attorney).

Conflicts Disclosures and Agency Affirmation Statements: As mentioned above, outside counsel's Conflicts Disclosure statement must be attached to the agency's electronic submission of the RtR and must be dated no more than 30 (thirty) calendar days prior to the date the RtR is either initially submitted, or, if the RtR requires revisions, the date submitted in its final acceptable form. Outside counsel must sign the statement and attest to its completeness and accuracy. Under section 57.4(d)(1) of the Texas Administrative Code, the Conflicts Disclosure must identify:

[E]very 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 agency officials in connection with their official job duties and responsibilities.<sup>6</sup>

And, where matters are listed, it must also "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."<sup>7</sup> Additionally, the agency must affirm that it has reviewed the Conflicts Disclosure statement and is satisfied with the choice of the proposed outside counsel notwithstanding anything contained in the disclosure statement.<sup>8</sup> Agency Affirmation Statements must be dated after (or simultaneously with) outside counsel's final Conflicts Disclosure. Meaning, if a Conflicts Disclosure is updated during the RtR process, then an updated Affirmation Statement must also be submitted.

As a point of clarification, the OAG 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 and that requirement is an ongoing obligation for outside counsel which continues throughout the life of the contract. Outside counsel must monitor its conflicts for the duration of its representation and

<sup>4</sup> 1 Tex. Admin. Code § 57.5(e).

<sup>5</sup> *Id.*

<sup>6</sup> 1 Tex. Admin. Code § 57.4(d)(1).

<sup>7</sup> *Id.* § 57.4(d)(2).

<sup>8</sup> *Id.* § 57.4(e).

disclose to the agency and the OAG any existing or potential conflicts that arise concerning the agency, the 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.

*f. Total Liability to Outside Counsel*

The limitation of liability amount specified in the contract is the maximum value of the contract and is entered in Community as the “Anticipated Legal Costs.” The total of all legal service fees and expenses, regardless of the funding source or method, cannot exceed the limitation of liability amount (i.e., no payment over this amount may be made to outside counsel). Under no circumstances will expenses or fees relating to the representation be exempted from the limitation of liability.

*g. 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.<sup>9</sup> The RFQ must be published in the Electronic State Business Daily for a minimum of 30 (thirty) 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.

If an agency would like an exemption from the RFQ process requirements, it must *affirmatively certify in its RtR that the agency has good cause or a reasonable justification* for the exemption. The OAG does not determine what constitutes good cause or a reasonable justification; rather, such determinations must be made independently by the agency in consultation with agency’s internal legal counsel and/or agency leadership.

*h. Addendum B of the Outside Counsel Contract*

When submitting an RtR in the Community system, please be mindful of the following for Addendum B, which includes, Timekeepers, Rates (including Travel Rates), and Billing Period:

Timekeeper Rates and Classifications: Unless expressly approved by the First Assistant Attorney General in advance, hourly rates for attorneys shall not exceed \$525/hour, and hourly rates for non-attorney legal work (generally limited to paralegals, legal secretaries and legal assistants) shall not exceed \$225/hour.

- All other timekeepers (for example, Patent Agents) must be identified as “Other” with their specific title(s) entered in the classification field. These timekeepers are also generally limited to \$225/hr, but an agency may provide written justification for an increased rate for the OAG’s consideration.

<sup>9</sup> 1 Tex. Admin. Code § 57.4.

- “Not to exceed” — Agencies that wish to use hourly rates to identify an entire classification of employees must use a “not to exceed” rate. For example, such a rate would appear as “Partners’ rates shall not exceed \$300/hr.” This would mean that all partners are covered for any rate up to \$300/hour. If the agency wants to ensure that only certain individuals are providing their legal services, naming each individual and their specific hourly rate can be done. 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.”
- Be aware that outside counsel may not bill for administrative staff/support, law clerks, or interns under Section 5.5 of the OCC (if the contract is based on the OAG’s current template).
- Additionally, a Default Classification is included in Addendum B to allow the OAG more flexibility to approve invoices containing time billed by Attorneys, Paralegals, and Legal Assistants not otherwise listed in Addendum B. For example, if Addendum B includes “Attorney, Partner: \$525” and “Attorney, Associate: \$450,” but does not include “Attorney, Of Counsel,” and an invoice is submitted for OAG approval with time billed for “Attorney, Of Counsel,” rather than deny that billed time, the “Of Counsel” attorney’s hourly rate may default to the lower of either the lowest attorney rate expressly listed in Addendum B, or the hourly rate listed in the invoice.

Fixed Fee or Fee Schedule for Projects or Matters: Instead of using hourly rates, some legal services (for example, 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, \$900.” If the agency is requesting an OCC with both fixed fee and hourly rates, an agency must draft and upload its own Addendum B that includes language specifically directing when either the fixed fee or hourly rate ranges will be used because the Community system cannot populate billing terms for mixed and hourly services into a standard Addendum B. For 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, \$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 a 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 contract. Most frequently, the billing period will be monthly and in a calendar month format (i.e., beginning the first day and ending the last day of the calendar month). Additionally, 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 breach of the outside counsel contract, which could result in an Invoice being disapproved for payment. Agencies likewise must review Invoices and submit Voucher Requests to the OAG in a timely manner.

Travel: By setting hourly travel rates in an OCC, 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. The 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 timekeepers traveling for work 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 only providing work under a fixed fee schedule.

### **Invoices for Legal Services and Expenses Under Outside Counsel Contracts**

Please note, the OAG establishes a contract number for each OCC upon its approval. 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.

#### *a. Invoices*

Outside counsel must 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 submit a Request for Voucher Approval through the online Community system. 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 Request".

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

Outside counsel must submit Invoice(s) to the agency for review withing one calendar month from the end of the relevant billing period covered by the Invoice. The agency must submit Invoices and the corresponding Request for Voucher Approval to the OAG within 25 (twenty-five) days<sup>10</sup> of the agency's receipt of a "correct and complete Invoice"<sup>11</sup> from outside counsel.

<sup>10</sup> Tex. Gov't Code § 402.0212(b)(1).

<sup>11</sup> See 1 Tex. Admin. Code § 57.6(b) (defining "correct and complete Invoice").

The 25-day-period begins once the last, timely, correct and complete Invoice for the relevant billing period has been received by the agency.

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

Once the Voucher Request 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 Request are rejected, or if the OAG has questions regarding a Voucher Request, it will contact the agency to attempt to resolve the issue. *The OAG cannot discuss invoice issues with outside counsel.*

*b. Expenses*

If outside counsel bills for allowable expenses, copies of actual, itemized receipts must be submitted to the agency. Additional details of what may and may not constitute reimbursable expenses are found in Sections 5 and 6 of the OCC (if the contract is based on the OAG's current template). Examples of expenses that are not reimbursable include, without limitation: gratuities; 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.

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.<sup>12</sup> 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.

The agency shall also include with any Voucher Request (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,

<sup>12</sup> Tex. Gov't Code § 402.0212(b).



are within the scope of the legal services authorized by the contract and are reasonably necessary to fulfill the purpose of the contract.<sup>13</sup> This certification is part of the submission process in the Community system.

### **Administrative Fee**

Outside counsel must pay an administrative fee to the OAG for the review of Invoices.<sup>14</sup> 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 30 (thirty) calendar days of the date the proposed OCC has received final approval by the OAG and been returned to the agency. If outside counsel has not submitted the required administrative fee within that time, the OAG’s approval of the OCC may be withdrawn. Any Invoice submitted to the OAG for review as part of a Voucher Request 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 very narrow and limited exemption from the administrative fee and Invoice review only for 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 due immediately upon notice by the OAG that testing will occur. If an exemption is not requested and/or the OCC’s Scope of Services does not qualify for the exemption, but it is subsequently discovered that the agency has been paying invoices without submitting and receiving approval of Voucher Requests, the agency must contact the OAG immediately.

The administrative fee is set on a sliding scale, based on the contract maximum value<sup>15</sup>, as follows:

<b>Limitation of Liability Amount</b>	<b>Administrative Fee</b>
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

<sup>13</sup> *Id.* § 402.0212(b-1).

<sup>14</sup> Tex. Gov’t Code § 402.0212(c).

<sup>15</sup> Please note, the full administrative fee is owed regardless of what, if any, amount is subsequently invoiced under the OCC.



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 \$00.00.**

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 upon the OAG’s approval of the amendment and its return 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.

### **Amending an Outside Counsel Contract**

Any change to an executed and OAG-approved OCC must be supported by a written amendment and that amendment must also be approved by the OAG. An agency wishing to amend a contract must submit an amendment request through the Community system. Common reasons for amendment requests include increasing the limitation of liability amount or extending the term (end date). Please ensure the data entered in Community for the amendment terms conform to the OCC amendment template. A copy of the template is available in Community.

### **Access to the Community System**

Community may be used by anyone within an agency who needs access to OCC information. We strongly encourage agencies to review the Community User Guide for comprehensive details. User profiles in Community are broken into categories:

- Agency Head: Responsible for reviewing and administering the rights for users with Contract and Voucher Requester roles for their agency. The Agency Head also has all the rights of the Contract and Voucher Requester roles. Only one Agency Head permitted per agency.
- Contract and Voucher Requester: Has access to all Community activities except for user administration. Agencies may have more than one Contract and Voucher Requester.
- Contract or Voucher Requester: May only view and submit information and documents related to either RtRs or requests for voucher approval for their agency. An agency may have more than one Contract Requestor or Voucher Requester. Note, these roles are not required if a user with the Contract and Voucher Requester role will manage both RtRs and Voucher Requests for the agency.

**In Closing**

Should you have any additional questions regarding the outside counsel process, please do not hesitate to contact the OAG's General Counsel Division using the information below. Thank you for your attention to these important matters and the Attorney General looks forward to being of service to you.

**Important Addresses and Contact Information**

Requests to Retain Outside Counsel and Outside Counsel Contracts and Amendments:  
GCDContracts@oag.texas.gov

Requests 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 074-1  
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

If you have additional questions, you may reach the General Counsel Division at:  
(512) 936-1403 or  
(512) 463-9906



Control Number: 41622



Item Number: 5

Addendum StartPage: 0

**PUCT PROJECT NO. 41622**

**RULEMAKING TO PROPOSE  
NEW SUBST. R. §25.245,  
RELATING TO RECOVERY OF  
EXPENSES FOR RATEMAKING  
PROCEEDINGS**

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**BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS**

2013 SEP -6 AM 11:05  
FILED

**COMMENTS OF CITIES IN ENTERGY'S SERVICE AREA**

The Cities of Anahuac, Beaumont, Bridge City, Cleveland, Conroe, Dayton, Groves, Houston, Huntsville, Liberty, Montgomery, Navasota, Nederland, Oak Ridge North, Orange, Pine Forest, Pinehurst, Port Arthur, Port Neches, Rose City, Shenandoah, Silsbee, Sour Lake, Splendora, Vidor, and West Orange ("Entergy Steering Committee of Cities") file these Comments in the above styled and numbered project pursuant to the Commission Staff's request issued on August 7, 2013. Pursuant to the Commission Staff's request, these comments are timely filed.

**I. Response to Request for Comments**

**1. What revisions to the rate filing package form could be made that would result in reduced costs for ratemaking proceedings?**

The Commission's rate filing package could be modified to reduce the costs for ratemaking proceedings by requiring utilities to include along with the rate filing package responses to frequently asked questions. Other jurisdictions require utilities to respond to frequently asked questions as part of the utility's application. Examples of documents frequently requested are specific financial reports filed with the SEC, FERC or shareholders during the test period. There are several other common questions on the rate change request. As part of this rulemaking, interested parties and Staff could make a list of frequently asked questions for utilities to respond to along with the rate filing package.

Another addition to the rate filing package that would conserve rate case expenses would be to have a uniform working cost of service model. The Company would be required to file the model with the application and provide copies to parties. This would reduce the expenses to parties of having to recreate a cost of service model from the

Company's filing and would be more efficient as all parties would be working from the same cost of service model.

A required technical conference on the utility's application should result in streamlining the discovery process and reducing costs for parties. Parties could have a set date to provide topics and questions on the utility's application to be addressed at the technical conference and the utility should have representatives available to discuss the issue and answer questions.

**2. What revisions to the process of reviewing rate case expenses could facilitate the review of costs incurred in ratemaking proceedings?**

The current process of reviewing rate case expenses through an adversarial proceeding protects customers from excessive rate case expenses. Currently the Commission requires proof of the reasonableness of rate case expenses through testimony filed in a contested case. The rate case expenses incurred are set out in itemized bills showing hours and expenses. The standards of review for rate cases expenses have been developed through the years and Commission precedent and protect customers from excessive rate case expenses.

**3. Please respond to the following questions regarding the cost of discovery in ratemaking proceedings.**

- a. Is reducing the cost of participating in a ratemaking proceeding possible by limiting the use of discovery in ratemaking proceedings? If you believe so, please provide examples of reasonable limitations on the use of discovery.**

No. Measures directed at limiting the quantity of RFI responses could reduce the effectiveness of regulation and could actually result in more litigation over issues that would not have been litigated had certain information been produced through discovery. Limiting the quantity of discovery could also result in increased litigation over the actual discovery process. Instead of focusing litigation on the critical issues in dispute, parties may feel the need to litigate the responsiveness of RFI's, the method of counting RFI's, and motion's to enforce specific responses to RFI's.

Limiting the quantity of RFI's and RFI responses should not reduce the cost of participating in a ratemaking proceeding without reducing the effectiveness of the

regulatory process. Affording parties full discovery promotes the fair resolution of disputes.<sup>1</sup> The purpose of discovery is to reveal facts, not conceal them. Promoting full discovery allows rate cases to be “decided by what the facts reveal, not by what facts are concealed.”<sup>2</sup>

Due to the complexity, quantity of issues, and number of witnesses (fact and expert) presented in a typical base rate case, rate cases often necessitate large amounts of discovery to reveal the facts upon which a decision should be based. Limiting the amount of discovery could potentially shield relevant information from discovery and could prevent the development of a full record. Without the ability to discover relevant facts, the effectiveness of the regulatory process could be compromised.

The Commission’s Rules already provide sufficient protections against unwarranted or excessive discovery. The Commission’s rules permit the ALJ hearing the case to make case by case determinations of limiting discovery when the circumstances of the case or discovery requests warrant limitation.<sup>3</sup> The Commission’s Rules also provide sanctions for a party abusing the discovery process.<sup>4</sup> Given that the Commission’s Rules already provide limitations for excessive or unwarranted discovery, there is no need to impose additional limitations that could limit the discovery of relevant information.

- b. If limitations on the use of discovery are to be implemented, should separate limitations be set for different ratemaking proceedings, such as base rate cases, energy efficiency cost recovery factor cases, transmission cost recovery factor cases, etc.? How should these be structured?**

The Commission’s Rules already sufficiently provide the Administrative Law Judge hearing a case to limit discovery on a case by case basis taking into consideration the specific type of case, facts involved, issues in dispute, and the utility’s legal or factual basis for making the rate request.<sup>5</sup> If the Commission were to limit discovery by rule, it should also be specific to the type of case, the issues involved in the case, and provide exceptions for situations requiring additional discovery. Any discovery limits should not

<sup>1</sup> *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991).

<sup>2</sup> *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999) (citing *Jampole v. Touohy*, 673 S.W.2d 569, 573 (Tex. 1984)).

<sup>3</sup> PUC Proc. R. 22.142.

<sup>4</sup> PUC Proc. R. 22.161(b)(2).

<sup>5</sup> See PUC Proc. R. 22.142.

apply to instances when the utility's position is unique or novel, such as in many requests for special circumstance variances from the Rules, or to instances when the utility's position does not comply with statutory authority, Commission Rules, or precedent. As stated above, the need for exceptions to limitations has been recognized by the Commission. In PUC Proc. R. 22.142, the Commission has determined that any limitations on discovery should be made on a case by case basis taking into account the following:

- (A) The type of proceeding.
- (B) The number and complexity of the issues in the proceeding.
- (C) The cost of alternative forms of discovery for the party seeking discovery.
- (D) The comprehensiveness of the information provided in the application.
- (E) Any material deficiencies in the application.
- (F) The number of issues that the party seeking discovery is expected to address.
- (G) The novelty of the issues in the proceeding.
- (H) The number of answers required by requests, including subparts, propounded in similar proceedings.
- (I) Whether the number of questions is limited in other forms of discovery.
- (J) Whether the hearing on the merits will be shortened by virtue of questions that are answered.
- (K) Any jurisdictional deadlines.<sup>6</sup>

However, limiting the quantity of discovery by issue could lead to more litigation surrounding discovery rather than limiting the time and expense involved in the discovery process. For instance, a utility may request unique rate treatment that is not contemplated by the Commission's Rule governing the issue. Parties may need additional discovery to account for the unique position taken by the utility. Typically when a utility requests unique rate treatment, the utility does not view their position as unique or contrary to the Commission's Rules. So there may be an initial dispute over the utility's compliance with the Rule in determining the amount of discovery needed to address the company's position.

Moreover, the utility may not have filed sufficient information with their application in order for parties to determine whether the utility is complying with the

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<sup>6</sup> PUC Subst. R. 22.142(d)(1).

Commission's Rules or precedent. In this scenario, initial discovery would be needed before any determination could be made whether additional discovery would be needed as a result of a unique position.

**4. Please answer the following questions regarding the possibility of the Public Utility Commission of Texas (Commission) retaining the services of a consultant or auditor to review a utility's request for recovery of the cost of participating in a ratemaking proceeding.**

**a. What would be the benefits of retaining a consultant or auditor?**

A consultant or auditor would add an additional party to rate cases and add the actual expenses of the consultant or auditor to the cost of litigation expenses. An outside auditor that is unfamiliar with the case and the issues involved may not provide any benefit that could not be provided through litigation of the rate case expenses in a contested case by the intervenors and Staff.

Currently, rate case expenses are reviewed through the contested case process. Staff and intervenors, who represent the interests of customer groups potentially paying the cost of rate case expenses, have the opportunity to address the reasonableness of rate case expenses and contest any rate case expenses deemed unreasonable. The intervenors and Commission Staff participating in the actual rate cases would be in the best position to contest rate case expenses as they have firsthand knowledge of the issues involved in the case.

**b. How should the process be structured?**

See response to Question 4.a.

**c. Could the implementation of an audit process result in the unintended consequence of increased ratemaking costs? If so, how?**

Yes. See response to question 4.a.

**d. What would be appropriate methods of funding the retaining of a consultant or auditor?**

As stated above, the expenses of retaining a consultant or auditor is an unnecessary expense. Intervenors and Staff already incur the expenses of retaining consultants or auditors when the reasonableness of rate case expenses is at issue. There is



no benefit to retaining additional consultants or auditors as the public interest is already sufficiently represented.

**5. Please respond to the following questions regarding the possibility of establishing a maximum reasonable hourly rate for legal and consulting services.**

**a. What would be the benefits of establishing a maximum reasonable hourly rate for legal and consulting services?**

There is no benefit to establishing a maximum reasonable hourly rate. A maximum rate would likely tend to cause rates to gravitate toward the maximum. The current method of determining the reasonableness of rates works well. Currently the Commission bases the reasonable level of rate case expenses on the experience, reputation, and ability of the attorney or consultant as well as the rates typically charged for the type of services in Texas and in the field of utility regulation. Often those attorneys and consultants have experience or degrees in multiple relevant fields, making their expertise more valuable as only one expert may be necessary when it may otherwise have taken two experts.

**b. How should such a process be structured?**

See response to Question 5.a.

**c. If the commission adopts maximum reasonable hourly rates, should the commission also adopt specific procedures for reviewing or limiting the number of hours billed for legal and consulting services provided at or below the maximum reasonable hourly rates?**

See response to Question 5.a.

**6. Please respond to the following questions regarding cases in which a utility seeks to recover the cost of reimbursement of a municipality's ratemaking case expenses. Additionally, please explain the rationale for your answers.**

**a. What is the appropriate allocation of those costs among the utility's customer classes?**

Municipal rate case expenses, like all rate case expenses, should be allocated to customer classes based upon a revenue requirement allocator. The revenue requirement used in the allocation process should be the Commission approved revenue requirement.

- b. Is it appropriate to collect those costs from all of the utility's customers, or only a subset of customers?**

Municipal rate case expenses should be allocated system wide as all customers benefit from municipal participation in rate proceedings.

- 7. If you have participated in a rate case in the past 10 years, please provide the following information from each of your previous two rate cases.**

- a. How many requests for information did you propound and respond to?**
- b. What was the cost of propounding or responding to those requests?**
- c. What were the highest, lowest, and average hourly billing rates for attorneys you retained?**

The highest hourly billing rates for non-testifying attorneys retained by the Entergy Steering Committee of Cities is \$275 per hour. The lowest hourly billing rates for non-testifying attorneys retained by the Entergy Steering Committee of Cities is \$150 per hour. The average hourly billing rate is \$208 per hour.

- d. What were the highest, lowest, and average hourly billing rates for consultants you retained?**

The billing rates of consultants retained by the Entergy Steering Committee of Cities in past rate cases of ETI are as follows:

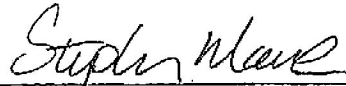
<b>Billing Rates of Outside Testifying and Consulting Experts</b>	
<b>Outside Resources</b>	<b>Rate \$/hr</b>
<b>Technical Associates, Inc. (Rate of Return)</b>	
Testifying Expert and Economist	\$200.00
Research	\$100.00
Clerical	\$50.00
<b>Diversified Utility Consultants (Depreciation and Cost of Service Issues)</b>	
Testifying Expert and Engineer	\$225.00
Associate	\$125.00
Analyst	\$75.00
<b>Potomac Management Group (Cost of Service Issues)</b>	
Testifying Expert and Economist	\$250.00
<b>Garrett Group LLC (Accounting and Cost of Service Issues)</b>	
Testifying Expert and Accountant	\$185.00
Economist and Analyst	\$140.00
Accountant and Analyst	\$135.00
Staff Analyst	\$80.00
<b>Resolved Energy Consulting (Fuel Related Issues and Cost of Service Issues)</b>	
Testifying Expert and Economist and Engineer	\$250.00
Regulatory Analyst	\$225.00
<b>Larkin and Associates (Federal Income Tax Related Cost of Service Issues)</b>	
Consulting Expert and Accountant	\$150.00
Research Associate	\$65.00
<b>Average Testifying Expert</b>	<b>\$220.00</b>
<b>Average Non-Testifying Consultant or Analyst</b>	<b>\$114.00</b>
<b>Over-all Average</b>	<b>\$150.33</b>

The highest rate for a testifying expert retained by the Entergy Steering Committee of Cities is \$250.00. The lowest hourly rate for a testifying expert is \$185.00 per hour. The average hourly rate for a testifying expert is \$220.00 per hour.

#### IV. PRAYER

For the above stated reasons, Cities respectfully request that after reviewing comments in this proceeding, the Commission make findings consistent with the Cities' recommendations and all other relief to which the Cities may show themselves to be justly entitled.

Respectfully submitted,  
LAWTON LAW FIRM, P.C.



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Control Number: 41622



Item Number: 6

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Project No. 41622

RULEMAKING TO PROPOSE NEW §  
SUBSTANTIVE RULE 25.245 §  
RELATING TO THE RECOVERY OF §  
RATE CASE EXPENSES §

Public Utility Commission

Of Texas

2013 SEP -6 AM 11:41  
FILED

**CITY OF EL PASO'S RESPONSE TO COMMISSION STAFF QUESTIONS**

Comes now the City of El Paso and files these comments in response to the Commission Staff's questions. The City commends the Staff for its concern over the cost of processing the cases, which costs are often borne by ratepayers. However, the City does not agree that limits on the amount of discovery in a rate case is an appropriate method to address the issue.

**QUESTIONS**

1. What revisions to the rate filing package form could be made that would result in reduced costs for ratemaking proceedings?

**Response:** Not addressed.

2. What revisions to the process of reviewing rate case expenses could facilitate the review of costs incurred in ratemaking proceedings?

**Response:** Rate case expenses could be reviewed as a part of the overall proceeding. While the amount of rate case expenses in most cases is not small, it is also usually not a hotly contested issue. When issues do arise, they are fairly clear and can better be addressed as a part of the overall rate case itself. Over the past several years, the practice has often been to sever the rate case expenses into a separate docket. Although no statistical study or comparison has been accomplished, it appears that the additional proceeding, including the additional data adds to the cost, which could be determined in the case in chief, perhaps with less accuracy, but still a reasonable amount.

3. Please respond to the following questions regarding the cost of discovery in ratemaking proceedings.

- a. Is reducing the cost of participating in a ratemaking proceeding possible by limiting the use of discovery in ratemaking proceedings? If you believe so, please provide examples of reasonable limitations on the use of discovery.

**Response:** No, the amount of discovery needed is wholly determined by the case itself. In over 35 years of involvement in rate case proceedings, the undersigned attorney for the City has not seen two rate cases in which the

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presentation and issues are identical. Each case has its own uniqueness, and requires different efforts in order to develop information so that the evidentiary hearing can develop sufficient information for a proper and fair resolution of the issues.

- b. If limitations on the use of discovery are to be implemented, should separate limitations be set for different ratemaking proceedings, such as base rate cases, energy efficiency cost recovery factor cases, transmission cost recovery factor cases, etc.? How should these be structured?

**Response:** The current system by which the rules impose no limitations on the amount of discovery has worked exceedingly well for many years. These issues in these cases are quite complex and often turn on fairly esoteric facts or issues. The art of getting to the bottom of those issues is not necessarily a simple process. If a limit were imposed by rule, it is likely that considerable time and effort would be expended in seeking exceptions to such a rule,

If limitations were to be imposed, they should be different for different types of cases. However, the facts in the Commission's files should already reflect lesser amounts of discovery in EECRF and other cases that are not rate cases, which is indicative of the fact that a rule imposed limit is not required.

4. Please answer the following questions regarding the possibility of the Public Utility Commission of Texas (commission) retaining the services of a consultant or audit or to review a utility's request for recovery of the cost of participating in a ratemaking proceeding.

- a. What would be the benefits of retaining a consultant or auditor?

**Response:** The City of El Paso does not believe that an audit process, as outlined, would be helpful to the determination of rate case expense issues. The only potential benefit would be the extent to which, if any, such a process would reduce some burden on the PUC staff in its review of material related to rate cases.

- b. How should the process be structured?

**Response:** The only conceivable process would be an early appointment of an auditor, and the regular submission of invoices to the auditor, with periodic reports. However, that type of process adds another dimension to the provision of materials during the course of the case.

- c. Could the implementation of an audit process result in the unintended consequence of increased ratemaking costs? If so, how?

**Response:** The use of such a process would result in increased cost in the case. The first added cost is the cost of the appointment of the auditor and its team, and the expenses of the formal submission process to the auditor and the auditor's review. The second cost is the cost of the response to the review process. The third cost is the hearing, if necessary should any of the requested expenses be recommended for disallowance by the auditor, and the party seeking those expenses disagree with the auditor's recommendation. The process would still require review by the ALJ in a contested hearing and the Commission.

- d. What would be appropriate methods of funding the retaining of a consultant or auditor?

**Response:** The only practical method of funding would be to have the utility advance the cost and then allow recovery as other rate case expenses are recovered.

5. Please respond to the following questions regarding the possibility of establishing a maximum reasonable hourly rate for legal and consulting services.

- a. What would be the benefits of establishing a maximum reasonable hourly rate for legal and consulting services?

**Response:** In some cases, the hourly rate for consultants, often for consultants and attorneys engaged by the utility company appears to be excessively high. In contrast, often, consultants and attorneys engaged by municipalities is at significantly lower rates as those attorneys and consultants are engaged in a process open to the public eye. However, the concept of a limitation on hourly rates by some process in each case would add yet another aspect and another cost of the ratemaking process. In addition, the parties should have the freedom and risk to engage the professionals they feel are best able to address the issues and provide advice, without an advance limitation on the rate or total cost to be allowed. On a case by case basis, the Commission has the ability to not find reasonable certain rates, and certain total costs.

- b. How should such a process be structured?

**Response:** The process would have to be part of the rate process, accomplished periodically as prevailing rates change. However, in order to assure input from all interested stakeholders, the process would have to be a ratemaking proceeding or a part of a ratemaking proceeding.

- c. If the commission adopts maximum reasonable hourly rates, should the commission also adopt specific procedures for reviewing or limiting the number



of hours billed for legal and consulting services provided at or below the maximum reasonable hourly rates?

**Response:** No. Other than general guidelines (check existing rule or RRC rule), a process that attempts to limit a number of hours or total number of hours for a case is inappropriate. At some point, the system has to contemplate that the officers of the court who practice before this commission are aware of their duty to exercise their professional judgment and experience to expend the amount of time necessary to prosecute or defend against positions taken by others in the case. Moreover, their judgment is subject to review in detail, which is not the case in most judicial proceedings for both sides.

6. Please respond to the following questions regarding cases in which a utility seeks to recover the cost of reimbursement of a municipality's ratemaking case expenses. Additionally, please explain the rationale for your answers.

a. What is the appropriate allocation of those costs among the utility's customer classes?

**Response:** Rate case expenses should be allocated to all customer classes. Typically, the utility's expense is not divided or easily severed into expenditures that affect a particular class. The utility would consider its approach to arrive at fair and just rates for all classes, and not be focused on a particular class. Obviously, allocation systems affect different types of customer classes differently. Similarly, municipalities as regulatory authorities have the obligation to assure that the rates are just and reasonable to all rate classes and be non discriminatory. Those views and obligations do not mean that everyone will agree with either the utility or the municipality, but those obligations.

b. Is it appropriate to collect those costs from all of the utility's customers, or only a subset of customers?

**Response:** There are only two types of customer subsets. Customers are divided by geography and by classes. The City of El Paso addressed allocations to classes as a part of the response to part "a." of this question. Given the Commission's preference and history of system wide rates, geography does not seem to be appropriate either. Geography is particularly a non-issue in the El Paso Electric service area. In the case of El Paso Electric, virtually all the municipalities in El Paso County follow the lead and action of the City of El Paso. Rates in the environs are the same as those within the City of El Paso. All approaches to rates have historically been

the same regardless of location in or out of cities. There is no reason here to have a different allocation approach.

7. If you have participated in a rate case in the past 10 years, please provide the following information from each of your previous two rate cases.

- a. How many requests for information did you propound and respond to?

**Response:** We don't have a record of the number of requests for information, in the two rate cases in the past 10 years. However, there were 28 sets of requests for information propounded in Docket 40094, and two sets to the City.

- b. What was the cost of propounding or responding to those requests?

**Response:** The costs were not segregated and have not been. For most intervenors, the approach to the case is in reviewing information in the filing, and discovery responses, including responses from other parties, which avoids duplication of effort. The process of analysis from the case filing itself to the filing of testimony/statements of position is a continuous process and not easily segregated into the cost of the discovery itself, unless there are specific disputes that need to be resolved by an ALJ. However, those types of issues have not arisen in recent cases in which the City of El Paso was a party.

- c. What were the highest, lowest, and average hourly billing rates for attorneys you retained?

**Response:** Attorney's fees retained by the City in the last case were between \$200 and \$380 per hour. An average by number of hours was not calculated.

- d. What were the highest, lowest, and average hourly billing rates for consultants you retained?

**Response:** Consultants retained by the City in the last case were between \$175 and \$250 per hour. An average rate by hours was not calculated.

8. Describe revisions to commission rules or other processes aside from the above that could result in reduced costs for ratemaking proceedings.

**Response:** Not addressed.

Respectfully submitted,

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PROJECT NO. 41622

RULEMAKING TO PROPOSE NEW § PUBLIC UTILITY COMMISSION  
SUBSTANTIVE RULE 25.245, RELATING §  
TO RECOVERY OF EXPENSES FOR §  
RATEMAKING PROCEEDINGS § OF TEXAS

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TEXAS INDUSTRIAL ENERGY CONSUMERS' REPLY COMMENTS

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) funds its own rate case participation and also pays a portion of the costs for utilities' and cities' rate case expenses. TIEC is often the only self-funded entity participating in rate matters before the Commission. TIEC does not, however, support changes that would restrict its ability to participate effectively in rate proceedings and believes that current rules are sufficient to allow the Commission to properly police rate case expenses. Specifically, the Commission has broad discretion under PURA §36.061 to allow recovery of only those rate case expenses that it finds to be reasonable, so it does not appear that a specific rule to address rate case expenses is needed. As demonstrated by parties' initial comments, crafting a predetermined "one-size-fits-all" set of standards for rate case expenses creates the potential for unintended or arbitrary outcomes. For example, nearly all of the initial comments noted that placing specific hourly rates or caps on attorney and consulting fees is not practical.<sup>1</sup> While several parties suggested identifying specific limits for expenses such as travel and meals, those parties also acknowledged that the limits would need to be adjusted or revised periodically.<sup>2</sup> Codifying and revising such detailed expense limits in a rule does not appear to be practical or advisable.

The Commission should also reject the utilities' attempts to use this rule to restrict the ability of Staff and intervenors to effectively participate in rate cases. Many of the utilities' comments focused on restrictive amendments to the rate filing package coupled with inappropriate limits on discovery. The utilities' efforts to use this rule to disadvantage other parties in rate proceedings should be rejected.

<sup>1</sup> See e.g., Oncor Comments at 6-7; CenterPoint Comments at 14-15; OPUC Comments at 11.

<sup>2</sup> CenterPoint Comments at 11-13; EPEC Comments at 6-7.

On the rate filing package issues, in time-limited rate proceedings Staff and intervenors would be severely disadvantaged without the up-front filing of a complete set of supporting testimony and data. The Commission should reject any changes to the rate filing package that would eliminate data or materials needed by the parties to quickly evaluate rate proposals.

The Commission should reject attempts to summarily limit discovery, which is based on the false premise that discovery creates unwarranted rate case expenses. As acknowledged even by Oncor Electric Delivery Company (Oncor), “utility rate cases are the equivalent of the most complex commercial cases tried in the courts.”<sup>3</sup> These cases often involve rate increases in the tens to hundreds of millions of dollars and complex issues crossing several disciplines such as depreciation, return on equity, taxes, cost allocation and rate design, prudence issues, and other policy matters. As shown in the chart attached as Exhibit A to these comments, a review of past base rate cases since 2000 demonstrates that, *in every case*, the final rate increase approved by the Commission was substantially less than the request initially proposed by the utility. In many cases, the approved rate increase was over 50% less than what was proposed by the utility. This suggests that current discovery rules are working as intended and that the information sought is not frivolous. To the contrary—through discovery, the Commission Staff and intervenors are identifying substantial issues leading to Commission-approved reductions in the utilities’ rate requests.

The chart in Exhibit A shows that the utilities’ rate requests have all been substantially higher than what the Commission found to be just and reasonable. In some cases, such as in Docket No. 40295, the recent Entergy Texas, Inc. (ETI) rate case that was the impetus for this rulemaking, this may be the result of a utility attempting to re-argue established Commission precedent.<sup>4</sup> Intervenors like TIEC who pay their own legal and consulting expenses must always perform a cost-benefit analysis before taking a position. That is, TIEC must determine the likelihood of success on a particular issue and whether pursuing it is worth the cost. As stated in TIEC’s initial comments, creating a structure that provides utilities with the same incentive would encourage the utility to file more reasonable proposals and to act more reasonably in rate

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<sup>3</sup> Oncor Comments at 5.

<sup>4</sup> *Application Entergy Texas, Inc. for Rate Case Expenses Pertaining to PUC Docket No. 39896*, Docket No. 40295, Order at 2 (May 21, 2013).

proceedings. There are several ways this could be achieved. As suggested by the Office of Public Utility Counsel (OPUC), the Commission could consider reducing recoverable rate case expenses by the percentage reduction of the approved rate increase from the utility-proposed rate increase.<sup>5</sup> Another approach would be to require utility shareholders to absorb a certain percentage of rate case expenses as a matter of course. Yet another option might be to require the shareholders to pay for the percentage of their rate case expenses that is proportional to their return on equity. All of these options give the utility some "skin in the game." These options would encourage a litigation cost-benefit analysis similar to the analysis done by intervenors that pay their own legal expenses. It would also encourage utilities to resist pushing proposals that have been clearly and repeatedly rejected by the Commission in previous cases.

In summary, a rule change does not appear to be necessary given that the Commission has broad authority to examine and disallow rate case expenses under PURA § 36.061. If the Commission does adopt a new rule, it should consider ways to incentivize utilities and the cities to act more like litigants who pay their own costs. The rulemaking should not, however, be used as a vehicle to limit Staff and intervenors' due process rights or diminish existing scrutiny of rate case filings, which would have the unintended consequence of increasing overall costs to consumers by far more than the current cost of rate case expenses.

TIEC provides the following specific replies to the responses of the other parties to certain of the questions posed by the Commission.

## **II. RESPONSE TO SPECIFIC STAFF QUESTIONS**

### **1. What revisions to the rate filing package form could be made that would result in reduced costs for ratemaking proceedings?**

TIEC does not recommend considering changes to the rate filing package form as a part of this proceeding. As shown by the comments of various parties suggesting changes, such changes would require a detailed analysis to ensure that the changes did not impact the ability of Staff and intervenors to quickly evaluate the proposed rates. This inquiry would be better accomplished in a separate proceeding dedicated to that purpose.<sup>6</sup> TIEC notes the Commission

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<sup>5</sup> OPUC Comments at 3-4.

<sup>6</sup> See, e.g., CenterPoint Comments at 9-10; ETI Comments at 1-2; SPS Comments at 1-2; City of Houston Comments at 1-2.

has already initiated Project No. 39547, Project to Revise Rate Filing Package for Vertically Integrated Utilities, for this purpose.

**3. Please respond to the following questions regarding the cost of discovery in ratemaking proceedings.**

**a. Is reducing the cost of participating in a ratemaking proceeding possible by limiting the use of discovery in ratemaking proceedings? If you believe so, please provide examples of reasonable limitations on the use of discovery.**

The cost of participating in rate proceedings should not be divorced from the benefits of that participation. As shown in the chart attached to these comments as Exhibit A, the benefits of that participation are substantial and limiting discovery could endanger those benefits by prohibiting appropriate scrutiny of utilities' rate requests, resulting in higher overall costs to consumers. Current discovery rules and participation by Commission Staff and intervenors have assisted the Commission in determining where the utility has failed to demonstrate that its proposed revenue requirement is just and reasonable. The Commission's decision to reduce the requested rate increase by more than 50% in many of these cases demonstrates the importance of permitting full discovery and intervenor participation. Further, the presiding officer in a rate case already has authority to limit discovery as appropriate on a case-by-case basis under PUC Proc. R. 22.142. Prescribing additional limitations would only inhibit parties' – and ultimately, the Commission's – ability to scrutinize the reasonableness of rate requests, which will result in higher overall rates.

**Response to CenterPoint Houston and El Paso Electric**

The Commission should reject the proposals made by CenterPoint Energy Houston Electric, LLC (CenterPoint) in its comments. CenterPoint first suggests that the Commission should adopt discovery limitations such as those set forth in the Texas Rules of Civil Procedure, Rules 190-200.<sup>7</sup> However, not all of the Rules cited by CenterPoint are applicable. As noted by Oncor, base rate cases are analogous to extremely complex civil litigation, which would be the equivalent to a Level 3 case under Rule 190.4 of the Texas Rules of Civil Procedure (included in Exhibit 2 to CenterPoint's comments). Under Rule 190.4, the court may establish a discovery plan tailored to that specific proceeding. However, such a tailored discovery plan is already

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<sup>7</sup> CenterPoint Comments at 3.



authorized under PUC Proc. Rule 22.142. Under this rule, the hearing examiner in a specific case may limit discovery, including the number of requests for information that may be asked, based upon the type and complexity of the proceeding, the material deficiencies in the utility's filing, the number of issues raised and the novelty of such issues. To attempt to craft a rule that is more specific than what already exists would be extremely difficult and could have unintended negative consequences. Even Oncor acknowledges in its comments that "prior efforts to develop an approach that is easily understood, workable, and will not result in disputes about the imposition of those limits (which could cause rate case expenses to go up as the parties battle over whether the limits have been exceeded) have not been successful, leading to the current approach" established in Rule 22.142, which Oncor notes is consistent with state and federal law.<sup>8</sup>

Notably, if the discovery process were being abused to the extent implied by CenterPoint and others, the utilities would have availed themselves of the protections under Rule 22.142. However, the Steering Committee of Cities Served by Oncor points out that this rule has rarely been applied in recent years.<sup>9</sup> The reality is that the parties generally work collaboratively to try to minimize unnecessary discovery (and discovery disputes) while still effectively preparing their positions. In sum, the type of limitations that CenterPoint requests are unnecessary, would harm rate case participation, and ultimately reduce the Commission's ability to properly review utility rate requests.

CenterPoint next suggests that the burden of proof to demonstrate that various components of its revenue requirement shift from the utility to the intervenors.<sup>10</sup> Not only would this proposal be extremely bad policy, it is directly contrary to law. PURA §36.006 provides that "in a proceeding involving a proposed rate change, the electric utility has the burden of proving that (1) the rate change is just and reasonable, if the utility proposes the change; or (2) an existing rate is just and reasonable, if the proposal is to reduce the rate." CenterPoint's proposal would violate PURA since it proposes that the Commission treat certain expenses as "presumptively reasonable," thereby allowing the utility to avoid providing

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<sup>8</sup> Oncor Comments at 3.

<sup>9</sup> Steering Committee of Cities Comments at 6.

<sup>10</sup> CenterPoint Comments at 6.

supporting documentation or testimony on these expenses.<sup>11</sup> CenterPoint's proposal would not only fail to meet the utility's statutory obligation to prove that its expenses are just and reasonable, but it would also likely have the effect of increasing, rather than decreasing, the amount of discovery required, since intervenors would have to probe each expense for which the utility did not provide evidence. CenterPoint's proposal should be rejected.

Finally, CenterPoint proposes default alignment of municipal intervenors, while El Paso Electric Company goes even further to suggest mandatory alignment of *all* intervenors.<sup>12</sup> This approach should be rejected. It is imprudent, undermines parties' ability to protect their respective interests, and is contrary to the Commission's intervention policies. First, it is simplistic and unreasonable to suggest that intervenors may be lumped together in groups such as "Large Power" as suggested by El Paso Electric. Consumers that appear to be similar based on one set of criteria may have widely differing positions in a rate proceeding depending upon their specific usage characteristics or other considerations. Further, until discovery is performed and each party develops its position, it is not possible for the hearing examiner (or the parties) to know whether parties have similar positions. Thus, there are little to no rate case expense savings to be gained from alignment, and a high probability that this approach will inappropriately and prejudicially restrict parties' ability to effectively represent their interests in rate proceedings. Moreover, PUC Proc. Rule 22.105 already permits a hearing examiner to require the alignment of intervenors when such alignment is appropriate. Addressing this separately through a new rule requirement would be inappropriate and superfluous. For these reasons, the Commission should not adopt the proposals set forth by CenterPoint and El Paso Electric.

#### **Response to Oncor Electric Delivery**

While TIEC agrees with much of Oncor's position regarding the impracticality of imposing specific discovery limitations in the context of a rule, TIEC does not agree with Oncor's proposal that no discovery be permitted for two weeks following the filing of the

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<sup>11</sup> CenterPoint suggests that expenses associated with information technology, audit services, business support services, communications, legal, claims, corporate records, corporate compliance, community relations and investor relations would be treated to this favored status.

<sup>12</sup> CenterPoint Comments at 8; EPEC Comments at 8.

utility's rate filing package.<sup>13</sup> The time for discovery in a rate case is already constrained by the 185-day statutory limitation for processing the proceeding. It is unreasonable to further compress the parties' ability to conduct discovery by imposing an arbitrary time period in the beginning of the case during which no discovery may be conducted. Oncor raises this issue because of the so-called "stock" RFIs that it receives from certain parties.<sup>14</sup> If anything, these "stock" RFIs would suggest that the rate filing package should be expanded (not contracted as some utilities propose) to include the information requested, rather than limiting all parties (including those such as TIEC who do not have "stock" RFIs) from conducting discovery. The Commission should reject this proposal, which would unreasonably restrict the ability of Staff and intervenors to participate in rate proceedings. As noted above, if the Commission decides to revise the rate filing package requirements, this should be done in a separate proceeding.

**6. Please respond to the following questions regarding cases in which a utility seeks to recover the cost of reimbursement of a municipality's ratemaking case expenses. Additionally, please explain the rationale for your answers.**

**b. What is the appropriate allocation of those costs among the utility's customer classes?**

**c. Is it appropriate to collect those costs from all the utility's customers, or only a subset of customers?**

TIEC believes that allocation of rate case expenses is a matter that should be addressed on a fact-specific basis in individual proceedings. However, if this issue is to be addressed in a rule, TIEC generally supports the allocation of rate case expenses on base revenues, which was approved by the Commission in the most recent ETI rate case expense proceeding.<sup>15</sup>

The Commission should also consider whether municipal rate case expenses should be borne by customers within the intervening cities. Customers outside intervening municipalities have no ability to influence positions taken by the municipalities and cannot vote in city elections. Further, intervenors with separate representation could also be excluded from paying municipal rate case expenses, since those entities have to pay for their own legal costs, and

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<sup>13</sup> Oncor Comments at 4.

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

<sup>15</sup> *Application Entergy Texas, Inc. for Rate Case Expenses Pertaining to PUC Docket No. 39896*, Docket No. 40295, (May 21, 2013).

therefore pay rate case expenses twice if the municipality rate case expenses are allocated to all customers. Directly assigning rate case expenses to customers within the participating cities is also another way the Commission can align the costs and benefits of each litigants' rate case participation, as discussed previously.

**8. Describe revisions to commission rules or other process aside from the above that could result in reduced costs for ratemaking proceedings.**

TIEC agrees with OPUC's recommendation that the Commission consider ways to create incentives for a utility to perform the same type of cost-benefit analysis that self-funded litigants do.<sup>16</sup> If a utility knew that it would be responsible for some portion of its rate case expenses, it might give more consideration to the costs and benefits of raising certain issues. This could include decisions to challenge established Commission precedent, whether to bring multiple lawyers to a proceeding, or whether to pursue certain procedural or discovery disputes that have a low probability of success. As with self-funded litigants, requiring utilities to be at least partially accountable for the costs of these activities would increase the incentive to adopt a reasonable litigation strategy. As discussed above, these incentives could be created by only allowing recovery of rate case expenses in proportion to the level of revenue requirement ultimately approved by the Commission or by requiring the utility to absorb its own rate case expenses proportionate to its return on equity since a percentage of rate case expense accrues solely to the benefit of utility shareholders. PURA gives the Commission broad discretion to determine whether to permit recovery of rate case expenses, and the Commission can determine that it is not reasonable for ratepayers to pay for the portion of rate case expenses that solely benefits the utility, or for rate case expenses incurred to support costs that are disallowed by the Commission.<sup>17</sup>

<sup>16</sup> OPUC Comments at 3-6.

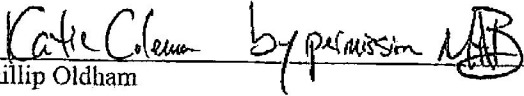
<sup>17</sup> PURA § 36.061; *Application Entergy Texas, Inc. for Rate Case Expenses Pertaining to PUC Docket No. 39896*, Docket No. 40295, Order at 2 (May 21, 2013); *City of Port Neches v. Railroad Commission of Texas*, 212 S.W.3d 565, 579 (Tex.App.—Austin 2006, no pet.) (holding that any fee incurred in presenting a "cost of service" argument is not automatically recoverable as a rate case expense); *City of El Paso v. Public Util. Comm'n*, 916 S.W.2d 515, 522 (Tex.App.—Austin 1995) (holding that the Commission has broad discretion to determine recovery of expenses in a ratemaking proceeding).

### III. CONCLUSION

As noted above, it does not appear necessary for the Commission to adopt a rule addressing rate case expenses. However, if the Commission does pursue a new rule, it should reject the utilities' attempts to use this rule to restrict Staff's and intervenors' ability to effectively participate in rate cases, which would ultimately reduce the Commission's ability to effectively review utility rate proposals and result in increased rates. TIEC also encourages the Commission to consider mechanisms that could incentivize better self-regulation of rate case expenses by cities and utilities. TIEC appreciates the opportunity to provide these reply comments and looks forward to discussing these issues further at the upcoming Commission workshop.

Respectfully submitted,

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ATTORNEYS FOR TEXAS INDUSTRIAL  
ENERGY CONSUMERS

**EXHIBIT A**

**COMPARISON OF PROPOSED AND APPROVED RATE INCREASES RESULTING  
FROM UTILITY-INITIATED RATE CASES**

(2000-2013)

Utility and Docket	Annual Increase Requested	Annual Increase Approved	Difference Between Requested and Approved Rates	Total Utility and Cities Rate Case Expenses	Expenses 100% Offset by Difference in Requested and Approved Rates
SPS Docket No. 40824 (settled)	\$89,800,000 <sup>1</sup>	\$50,800,000 <sup>2</sup>	\$39,000,000	\$4,600,000 <sup>3</sup>	44 days
El Paso Electric Docket No. 40094 (settled)	\$26,255,000 <sup>4</sup>	(\$15,000,000) <sup>5</sup>	\$41,255,000	\$8,650,000 <sup>6</sup>	77 days
Entergy Docket No. 39896	\$111,800,000 <sup>7</sup>	\$27,700,000 <sup>8</sup>	\$84,100,000	\$8,022,000 <sup>9</sup>	35 days
Oncor Docket No. 38929 (settled)	\$353,000,000 <sup>10</sup>	\$136,722,048 <sup>11</sup>	\$216,277,952	\$8,088,149 <sup>12</sup>	14 days
TNMP Docket No. 38480 (settled)	\$20,108,153 <sup>13</sup>	\$10,250,000 <sup>14</sup>	\$9,858,153	\$2,846,553 <sup>15</sup>	105 days
CenterPoint Docket No. 38339	\$92,000,000 <sup>16</sup> (retail)	\$14,650,000 <sup>17</sup> (retail)	\$77,350,000	\$7,748,902 <sup>18</sup>	37 days
SPS Docket No. 38147 (settled)	\$63,700,000 <sup>19</sup>	\$52,400,000 <sup>20</sup>	\$11,300,000	\$2,473,348 <sup>21</sup>	80 days
Entergy Docket No. 37744	\$ 211,482,728 <sup>22</sup>	\$68,000,000 <sup>23</sup>	\$143,482,728	14,855,000 <sup>24</sup>	38 days
El Paso Electric Docket No. 37690 (settled)	\$51,577,065 <sup>25</sup>	\$17,150,000 <sup>26</sup>	\$34,427,065	\$4,683,853 <sup>27</sup>	50 days

Utility and Docket	Annual Increase Requested	Annual Increase Approved	Difference Between Requested and Approved Rates	Total Utility and Cities Rate Case Expenses	Expenses 100% Offset by Difference in Requested and Approved Rates
SWEP Docket No. 37364 (settled)	\$74,988,528 <sup>28</sup>	\$15,000,000 <sup>29</sup>	\$59,988,528	\$4,569,489 <sup>30</sup>	28 days
TNMP Docket No. 36025 (settled)	\$24,360,253 <sup>31</sup>	\$6,800,000 <sup>32</sup>	\$17,560,253	\$3,882,696 <sup>33</sup>	81 days
SPS Docket No. 35763 (settled)	\$84,234,501 <sup>34</sup>	\$57,393,000 <sup>35</sup>	\$26,841,501	\$3,750,000 <sup>36</sup>	51 days
Oncor Docket No. 35717	\$253,468,000 <sup>37</sup>	\$115,061,510 <sup>38</sup>	\$138,406,950	\$6,737,010 <sup>39</sup>	18 days
Entergy Docket No. 34800 (settled)	\$107,500,000 <sup>40</sup>	\$28,170,000 <sup>41</sup>	\$79,330,000	\$6,900,000 <sup>42</sup>	32 days
AEP-TNC Docket No. 33310 (settled)	\$18,833,815 <sup>43</sup>	\$7,500,000 <sup>44</sup>	\$11,333,815	\$1,062,511 <sup>45</sup>	35 days
AEP-TCC Docket No. 33309	\$62,709,174 <sup>46</sup>	(\$52,479) <sup>47</sup>	\$62,761,653	\$5,346,644 <sup>48</sup>	32 days
SPS Docket No. 32766 (settled)	\$47,900,000 <sup>49</sup>	\$23,000,000 <sup>50</sup>	\$24,900,000	\$5,587,962 <sup>51</sup>	82 days
CenterPoint Docket No. 32093 (settled)	\$50,100,000 <sup>52</sup> (retail)	(\$62,860,000) <sup>53</sup> (retail)	\$112,960,000	\$7,087,000 <sup>54</sup>	26 days
Entergy Docket No. 30123	\$53,900,000 <sup>55</sup>	\$0 (dismissed due to rate freeze) <sup>56</sup>	\$53,900,000	not addressed	unknown
LCRA Docket No. 28906	\$75,005,286 <sup>57</sup>	\$54,436,969 <sup>58</sup>	\$20,568,317	\$752,244 <sup>59</sup>	14 days
AEP-TCC Docket No. 28840	\$66,476,000 <sup>60</sup>	(\$9,817,000) <sup>61</sup>	\$76,293,000	\$4,288,429 <sup>62</sup>	21 days

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- <sup>1</sup> Docket No. 40824, Final Order at FoF 1 (June 19, 2013).
- <sup>2</sup> Docket No. 40824, Final Order at FoFs 11-13 (June 19, 2013).
- <sup>3</sup> Docket No. 40824, Direct Testimony of Alice Jackson at 13. The stipulation does not specify an amount of reasonable and necessary rate case expenses, but does provide for amortization of any amounts over two years. See Final Order at FoF 21(d).
- <sup>4</sup> Docket No. 40094, Final Order at FoF 1 (May 23, 2012).
- <sup>5</sup> Docket No. 40094, Final Order at FoF 16.
- <sup>6</sup> The Final Order approving the stipulation notes that EPEC's application requested approval to surcharge an "anticipated" \$8.65 million in rate case expenses. Docket No. 40094, Final Order at FoF 1. The stipulation does not specify a reasonable and necessary rate case expenses but does require EPEC to amortize all rate case expenses over two years. Final Order at FoF 23.
- <sup>7</sup> Docket No. 39896, Order on Rehearing at 1 (Nov. 1 2012).
- <sup>8</sup> Docket No. 40295, Final Order at FoF 12 (May 21, 2013).
- <sup>9</sup> Docket No. 40295, Final Order at 3 (May 21, 2013).
- <sup>10</sup> Docket No. 38929, Final Order at FoF 3 (Aug. 26, 2011).
- <sup>11</sup> Docket No. 38929, Final Order at FoF 31.
- <sup>12</sup> Docket No. 39239, Final Order at FoF 17 (Dec. 9, 2011).
- <sup>13</sup> Docket No. 38480, Final Order at 2, n. 5 (Jan. 27, 2011).
- <sup>14</sup> Docket No. 38480, Final Order at FoF 12.
- <sup>15</sup> Docket No. 38880, Final Order at FoF 10 (June 13, 2011).
- <sup>16</sup> Docket No. 38339, Order on Rehearing at 1 (June 23, 2011).
- <sup>17</sup> Docket No. 38339, Order on Rehearing at 1.
- <sup>18</sup> Docket No. 39127, Final Order at 1 (June 6, 2011).
- <sup>19</sup> Docket No. 38147, Final Order at FoF 1 (March 25, 2011).
- <sup>20</sup> Docket No. 38147, Final Order at FoF 10.
- <sup>21</sup> Docket No. 38147, Final Order at FoF 18.
- <sup>22</sup> Docket No. 37744, Final Order at FoF 1 (Dec. 13, 2010); Application at Schedule Q-1 (Dec. 30, 2009) The requested increase consisted of a proposed base rate decrease (Q-1 at (f)(7)) offset by additional revenues from proposed riders (Q-1 at (i)(7), (k)(7)); Final Order at FoF 1).
- <sup>23</sup> Docket No. 37744, Final Order at FoFs 9, 16 (Dec.13, 2010).
- <sup>24</sup> Docket No. 37744, Direct Testimony of J. David Wright at 59. This is the amount Entergy requested in its Application. The stipulation does not specify an amount of reasonable and necessary operating expenses; however it does state that the agreed base rate increase provides "full and final recovery" of all related rate case expenses. Final Order at FoF 18.
- <sup>25</sup> Docket No. 37690, Application at 13 (Dec. 9, 2009).
- <sup>26</sup> Docket No. 37690, Final Order at FoF 15 (Jul. 30, 2010).
- <sup>27</sup> Docket No. 37690, Final Order at FoF 27 (Jul. 30, 2010).
- <sup>28</sup> Docket No. 37364, Final Order at FoF 1 (Apr. 16, 2010).
- <sup>29</sup> Docket No. 37364, Final Order at FoF 17 (Apr. 16, 2010). SWEPCO also received a one-time \$10 million surcharge for vegetation management.
- <sup>30</sup> Docket No. 37772, Final Order at FoF 17 (Oct. 21, 2010).
- <sup>31</sup> Docket No. 36025, Supplemental Application at 13 (Mar. 31, 2009).
- <sup>32</sup> Docket No. 36025, Final Order at FoF 20 (Aug. 21, 2009).
- <sup>33</sup> Docket No. 36025, Final Order at FoF 37 (Aug. 21, 2009).



- <sup>34</sup> Docket No. 35763, Application at 28 (Jun. 12, 2008).
- <sup>35</sup> Docket No. 35763, Final Order at FoF 13 (Jun. 2, 2009).
- <sup>36</sup> Docket No. 35763, Final Order at FoF 18(c).
- <sup>37</sup> Docket No. 35717, Final Order at 1 (Nov. 30, 2009). Oncor originally requested \$275 million but updated this request after 45 days. *See id.* and Application at Exhibit 4 (Jun. 27, 2008).
- <sup>38</sup> Docket No. 35717, Final Order at 1 (Nov. 30, 2009).
- <sup>39</sup> Docket No. 36530, Order on Rehearing at FoF 11 (Nov. 2, 2009). The Commission's decision was subsequently reversed and remanded by the Third Court of Appeals at *Oncor Elec. Delivery Co. LLC v. Public Utility Com'n of Texas* --- S.W.3d ---, 2013 WL 3013899, (Tex. App.-Austin, June 14, 2013, no pet.)
- <sup>40</sup> Docket No. 34800, Application at 5 (Sep. 26, 2007) The requested increase consisted of a \$64.3 million base rate increase and an additional \$43.3 million increase through various riders.
- <sup>41</sup> Docket No. 34800, Final Order at FoF 24 (Mar. 16, 2009) This number excludes \$18.5 million of the stipulated base rate increase that resulted from transferring from Rider IPCR costs to base rates upon termination of that rider.
- <sup>42</sup> Docket No. 34800, Final Order at FoF 27 (rate case expense awarded was \$2.3 million per year for three years).
- <sup>43</sup> Docket No. 33310, Application at 3 (Nov. 9, 2006) (excluding merger credits).
- <sup>44</sup> Docket No. 33310, Final Order at 4, FoF 14 (May 29, 2007) (excluding merger credits).
- <sup>45</sup> Docket No. 34301, Final Order at 2 (May 23, 2008)
- <sup>46</sup> Docket No. 33309, Application at 3 (Nov. 9, 2006) (excluding merger credits). During the course of the case, AEP-TCC reduced its requested base revenue increase to \$49,952,000. Order on Rehearing at 1 (Mar. 4, 2007).
- <sup>47</sup> *See* Docket No. 33309, Order on Rehearing at 1-2 (Mar. 4, 2007). This total is the base rate increase originally requested minus AEP-TCC's reduction, minus Commission disallowances in the amount of \$50,004,479.
- <sup>48</sup> Docket No. 34301, Final Order at 2 (May 23, 2008).
- <sup>49</sup> Docket No. 32766, Application at 32 (May 31, 2006).
- <sup>50</sup> Docket No. 32766, Final Order at FoF 10 (Jul. 27, 2007).
- <sup>51</sup> Docket No. 32766, Final Order at 2 (Jul. 27, 2007).
- <sup>52</sup> Docket No. 32093, Direct Testimony of Walter L. Fitzgerald at ES-1.
- <sup>53</sup> Docket No. 32093, Final Order at FoF 36 (Sep. 5, 2006).
- <sup>54</sup> Docket No. 32093, Direct Testimony of Helmuth W. Roesler at ES-2. CenterPoint requested recovery of this amount in its Application. The settlement did not specify an amount of rate case expenses but required amortization over four years.
- <sup>55</sup> Docket No. 30123, Application at 5 (consisting of a \$42,600,000 base rate increase as well as \$11.3 million proposed franchise fee rider).
- <sup>56</sup> *See* Docket No. 30123, Final Order at 1 (Oct. 20, 2004).
- <sup>57</sup> Docket No. 28906, Application at 3 (Nov. 17, 2003).
- <sup>58</sup> LCRA stated that the \$75,005,286 million increase requested was an 82% increase, indicating that its current total base rate revenues were approximately \$91,469,860. *Id.* The Commission ultimately approved a total revenue requirement of \$145,906,829. Final Order at 37 (Commission Schedule 1) (Apr. 5, 2005). This is a base revenue increase of approximately \$54,436,969, or approximately \$20.5 million less than LCRA requested.
- <sup>59</sup> Docket No. 28906, Final Order at 10 (Apr. 5, 2005). Additional amounts could be recovered in LCRA's next rate proceeding.
- <sup>60</sup> Docket No. 28840, Application at 3 (Nov. 3, 2003).
- <sup>61</sup> Docket No. 28840, Final Order at 1 (Aug. 15, 2005). AEP TCC sought a revenue requirement of \$519,900,000, and the approved revenue requirement was \$443,607,238, or \$76,292,762 less. This difference exceeded AEP TCC's requested increase by approximately \$9,817,000.
- <sup>62</sup> Docket No. 31433, Final Order at 1 (Mar. 3, 2006).

**§ 36.061. Allowance of Certain Expenses, TX UTIL § 36.061**

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Vernon's Texas Statutes and Codes Annotated  
Utilities Code (Refs & Annos)  
Title 2. Public Utility Regulatory Act (Refs & Annos)  
Subtitle B. Electric Utilities (Refs & Annos)  
Chapter 36. Rates (Refs & Annos)  
Subchapter B. Computation of Rates

V.T.C.A., Utilities Code § 36.061

§ 36.061. Allowance of Certain Expenses

Effective: June 14, 2013

Currentness

(a) The regulatory authority may not allow as a cost or expense for ratemaking purposes:

- (1) an expenditure for legislative advocacy; or
- (2) an expenditure described by Section 32.104 that the regulatory authority determines to be not in the public interest.

(b) The regulatory authority may allow as a cost or expense:

- (1) reasonable charitable or civic contributions not to exceed the amount approved by the regulatory authority; and
- (2) reasonable costs of participating in a proceeding under this title not to exceed the amount approved by the regulatory authority.

(c) An electric utility located in a portion of this state not subject to retail competition may establish a bill payment assistance program for a customer who is a military veteran who a medical doctor certifies has a significantly decreased ability to regulate the individual's body temperature because of severe burns received in combat. A regulatory authority shall allow as a cost or expense a cost or expense of the bill payment assistance program. The electric utility is entitled to:

- (1) fully recover all costs and expenses related to the bill payment assistance program;
- (2) defer each cost or expense related to the bill payment assistance program not explicitly included in base rates; and
- (3) apply carrying charges at the utility's weighted average cost of capital to the extent related to the bill payment assistance program.

**§ 36.061. Allowance of Certain Expenses, TX UTIL § 36.061**

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**Credits**

Acts 1997, 75th Leg., ch. 166, § 1, eff. Sept. 1, 1997. Amended by Acts 2013, 83rd Leg., ch. 597 (S.B. 981), § 1, eff. June 14, 2013.

Notes of Decisions (16)

V. T. C. A., Utilities Code § 36.061, TX UTIL § 36.061

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

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**End of Document**

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April 14, 2021

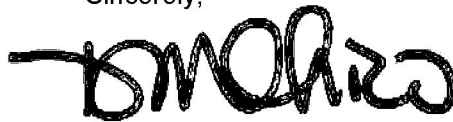
TO: All Parties of Record

RE: **OS-20-00004865:** *Statement of Intent Filed by Universal Natural Gas, Inc., to Increase and Consolidate Rates In the Unincorporated Areas Served by Universal Natural Gas, LLC, d/b/a Universal Natural Gas, Inc., Consumers Gas Company, LLC d/b/a Consumers Gas Company Inc., Enertex NB, LLC, and Gas Energy, LLC*

**HEARINGS LETTER NO. 33**  
**Final Order**

Attached is a copy of the Final Order, signed by the Commissioners at the April 13, 2021 Conference.

Sincerely,

A handwritten signature in black ink, appearing to read "Dee Marlo Chico". The signature is stylized with a large, sweeping initial "D" and "M".

Dee Marlo Chico  
Administrative Law Judge

Enclosure

cc: Service List

**Service List**

**OS-20-00004865**

**Statement of Intent Filed by Universal Natural Gas, Inc., to Increase and Consolidate Rates In the Unincorporated Areas Served by Universal Natural Gas, LLC, d/b/a Universal Natural Gas, Inc., Consumers Gas Company, LLC d/b/a Consumers Gas Company Inc., Enertex NB, LLC, and Gas Energy, LLC**

**Administrative Law Judge: Dee Marlo Chico  
Technical Examiners: Rose Ruiz and James Currier**

**Universal Natural Gas, LLC d/b/a  
Universal Natural Gas, Inc.;  
Consumers Gas Company, LLC  
d/b/a Consumers Gas Company,  
Inc.;  
EnerTex NB, LLC; and  
Gas Energy, LLC  
(Applicants)**  
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Damien Lyster  
Winston Skinner  
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Vinson & Elkins LLP  
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**Via US First-Class Mail and  
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**Via Email**

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**Via US First-Class Mail**

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**Via US First-Class Mail**

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President & Chief Executive Officer  
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[robert.barnwell@txgas.net](mailto:robert.barnwell@txgas.net)  
**Via Email**

cc: Kari French, RRC Austin – Director, Oversight & Safety Division  
Mark Evarts, RRC Austin – Director, Marketing Oversight Section

**16 TEX. ADMIN. CODE § 1.7 (Ex Parte Communications):**

- (a) *Ex parte communications are prohibited in contested cases as provided in the APA and other applicable rules including the Texas Disciplinary Rules of Professional Conduct.*
- (b) *Each party shall provide all other parties with a copy of all documents submitted to an examiner.*
  - (1) *The attachment of a certificate of service stating that a document was served on a party creates a rebuttable presumption that the named party was provided a copy.*
  - (2) *Failure to provide a copy to all other parties may result in rejection and return of the document without consideration.*

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# BEFORE THE RAILROAD COMMISSION OF TEXAS

STATEMENT OF INTENT TO INCREASE	§	
AND CONSOLIDATE GAS UTILITY	§	
RATES WITHIN THE UNINCORPORATED	§	HEARINGS DIVISION
AREAS SERVED BY UNIVERSAL	§	
NATURAL GAS, LLC d/b/a UNIVERSAL	§	
NATURAL GAS, INC., CONSUMERS GAS	§	
COMPANY, LLC d/b/a CONSUMERS GAS	§	OS-20-00004865
COMPANY, INC., ENERTEX NB, LLC,	§	
AND GAS ENERGY, LLC	§	
	§	

## FINAL ORDER

Notice of Open Meeting to consider this Order was duly posted with the Secretary of State within the time period provided by law pursuant to Tex. Gov't Code Chapter 551, *et seq.* The Railroad Commission of Texas adopts the following findings of fact and conclusions of law and orders as follows:

## FINDINGS OF FACT

1. Universal Natural Gas, LLC d/b/a Universal Natural Gas, Inc. ("UniGas"), Consumers Gas Company, LLC d/b/a Consumers Gas Company, Inc. ("Consumers"), EnerTex NB, LLC ("EnerTex"), and Gas Energy, LLC ("Gas Energy") (collectively, "Applicants"), are each a gas utility as that term is defined in the Texas Utilities Code and are subject to the jurisdiction of the Railroad Commission of Texas ("Commission").
2. On October 9, 2020, Applicants filed with the Commission a Statement of Intent to increase and consolidate gas utility rates within the unincorporated areas they serve in the State of Texas (the "SOI"). The SOI was docketed as OS-20-00004865 at the Commission.
3. In the SOI, Applicants requested to consolidate the entities with UniGas as the surviving entity. Applicants developed their proposed rates based on the cost of providing service to all customers served by Applicants.
4. On November 4, 2020, the Commission suspended the effective date for Applicants' rate increase for 150 days, and Applicants agreed to extend the statutory deadline further to April 13, 2021.
5. Applicants provided direct mail notice of the SOI to change rates to all affected customers, which was completed on November 25, 2020.
6. The form and publication of the notice meets the statutory and rule requirements and provides sufficient information to ratepayers regarding the rate request in accordance with Tex. Util. Code § 104.103(b) and 16 Tex. Admin. Code §§ 7.230 and 7.235.
7. Staff of the Commission ("Staff") timely intervened on October 13, 2020, and the Administrative Law Judge ("ALJ") granted party status the same day.
8. From November 30, 2020 through January 11, 2021, the Commission received numerous comment letters from the public opposing Applicants' proposed rate amounts. Those customers were mailed a "Complaint and Statement of Intent to Participate Form" in

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compliance with 16 Tex. Admin. Code § 7.240 (Statement of Intent to Participate). Statement of Intent to Participate Forms were completed by Mr. Steve Alton on December 14, 2020, Mr. Oscar Hudnall on December 17, 2020, Mr. Joseph S. Kowalczyk on December 23, 2020, Mr. and Mrs. Donald and Amber Golsby on December 31, 2020, and Mr. and Mrs. Gary and Rosemary White on January 1, 2021.

9. Mr. Steven Alton and Mr. Oscar Hudnall were admitted as protestants to the proceeding on December 30, 2020. Mr. Joseph S. Kowalczyk was admitted as a protestant to the proceeding on January 7, 2021. Mr. and Mrs. Donald and Amber Golsby and Mr. and Mrs. Gary and Rosemary White were admitted as protestants on January 12, 2021.
10. On January 12, 2021, the ALJ abated all pending procedural deadlines.
11. On January 13, 2021, the ALJ issued the Notice of Hearing, which set the hearing on the merits to commence on February 18, 2021 (the "Hearing").
12. On January 15, 2021, the Commission published the Notice of Hearing in *Gas Utilities Bulletin No. 1147*.
13. On January 22, 2021, the ALJ mailed the Notice of Hearing to the governing bodies of affected municipalities and counties in accordance with Tex. Util. Code § 104.105 (Determination of Propriety of Rate Change; Hearing).
14. On February 2, 2021, Mr. Joseph S. Kowalczyk filed a Motion to Withdraw as a protestant in the proceeding, which the ALJ granted on February 4, 2021.
15. On February 12, 2021, Applicants and Staff filed a settlement agreement in the proceeding.
16. The Hearing commenced on February 18, 2021 and concluded on February 19, 2021.
17. Mr. Oscar Hudnall was the only protestant who appeared at the Hearing. Mr. Hudnall chose not to participate as a litigant. Instead, he gave unsworn, non-testimonial public comment opposing Applicants' proposed rate increase.
18. The evidentiary record in this case consists of the Applicants' exhibits admitted at the hearing on February 19, 2021 and the Applicants' exhibits admitted under seal in a ruling dated February 24, 2021. The evidentiary record also includes an additional exhibit that Applicants and Staff filed on March 8, 2021 (the Amended Settlement Agreement) and on March 15, 2021 (the Second Amended Settlement Agreement), which the ALJ admitted on March 9, 2021 and March 16, 2021, respectively. The amendments to the settlement agreement updated the Rate Schedule Cost of Gas. Also included in the evidentiary record, through official notice taken by the ALJ, are the Applicants' filings responding to Examiner Request for Information ("RFI") 1-1, 1-2, 1-3 and 1-4 filed on March 1, 2021; Applicants' filings responding to Examiner RFI 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, and 2-7 filed on March 15, 2021; and Staff's filing responding to Examiner RFI 2-1(b) filed on March 12, 2021.
19. On March 16, 2021, the ALJ closed the evidentiary record.

#### **Settlement Agreement**

20. On January 8, 2021, Applicants and Staff (collectively, the "Parties") notified the ALJ they had reached an agreement in principle that would resolve all issues in the case.

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21. On February 12, 2021, the Parties filed the *Settlement Agreement* (the "Settlement") and accompanying documents which resolved all issues. On March 8, 2021, the Parties filed an *Amended Settlement Agreement* that amended one of the rate schedules—the Rate Schedule Cost of Gas—to which the Parties agreed. Appended to the Order are **Attachment 1** (Rate Schedules and Tariffs) and **Attachment 2** (Depreciation Rates and Net Plant in Service). The cost of service agreed to by the Parties in the Settlement is based upon the consolidation of Consumers, EnerTex, Gas Energy, and UniGas into one entity with UniGas as the surviving entity.
22. Applicants established that the consolidation of Consumers, EnerTex, Gas Energy and UniGas, with UniGas as the surviving entity ("Consolidated UniGas"), is in, and consistent with, the public interest under Section 102.051 of the Texas Utilities Code.
23. Applicants established that they maintain their books and records in accordance with the Federal Energy Regulatory Commission's ("FERC") Uniform System of Accounts ("USOA") prescribed for natural gas companies.
24. Applicants established that they have fully complied with the books and records requirements of 16 Tex. Admin. Code § 7.310, and the amounts included therein are therefore entitled to the presumption in 16 Tex. Admin. Code § 7.503 that these amounts are reasonable and necessary.
25. The test-year in this filing is based upon the financial data for the twelve-month period ending June 30, 2020.
26. The Settlement contemplates an overall revenue increase of \$995,000 that is not tied to any specific expense or methodology in Consolidated UniGas' underlying cost-of-service.
27. The \$995,000 revenue increase represents a decrease of approximately \$648,634 from the revenues requested in the original filing.
28. A total revenue requirement for Consolidated UniGas of \$7,628,369, an increase of \$995,000 from current revenues, is just and reasonable.
29. The proposed rates under the Settlement are reasonable and consistent with the rate-setting requirements of Chapter 104 of the Texas Utilities Code.
30. It is reasonable that the proposed rates will be effective for bills rendered on or after the effective date of this Order and will affect the classes of customers that are listed in **Table 1** below.
31. Consistent with the Settlement, the tariffs shall be implemented for bills rendered on or after the effective date of this Order and will replace and supersede those tariffs currently in effect for the Applicants.
32. The customer and consumption charges set forth below and reflected in **Attachment 1** are just and reasonable.



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**Table 1**

	<b>Monthly Customer Charge</b>	<b>Consumption Charge (per Mcf)</b>
Residential	\$ 18.00	\$3.14
Small Commercial	\$ 45.00	\$2.91
Large Commercial	\$175.00	\$2.91

33. The depreciation rates as reflected in **Attachment 2** are proper, adequate, just and reasonable.
34. Capital investment booked to plant through June 30, 2020 in the amount of \$22,955,825 as reflected on **Attachment 2** is prudent, used and useful, and just and reasonable.
35. Consistent with the Settlement, any capital investment items not in service by June 30, 2020, are not included in the net plant amount reflected in **Attachment 2** and are preserved for future prudence review and potential rate recovery once Consolidated UniGas files a rate-setting mechanism after those items have been placed into service and have become used and useful.
36. The following capital structure, cost of debt, cost of equity, and weighted cost of capital including the pre-tax rate of return, shown below, are just and reasonable:

**Table 2**

	<b>Capital Structure</b>	<b>Debt/Equity Cost</b>	<b>Weighted Cost of Capital</b>	<b>Pre-Tax Return</b>
Long-Term Debt	37.24%	5.31%	1.98%	1.98%
Common Equity	62.76%	9.50%	5.96%	7.55%
Rate of Return	100.00%		<b>7.94%</b>	<b>9.53%</b>

37. Consistent with the Settlement, any Interim Rate Adjustment ("IRA") filing Consolidated UniGas makes pursuant to Texas Utilities Code § 104.301 shall use the following factors until changed by a subsequent general rate proceeding:
  - a. The capital structure and related components shall be as shown above in **Table 2**.
  - b. For the initial IRA filing and for all subsequent IRA filings, the depreciation rate for each account shall be as shown in **Attachment 2**.
  - c. For the initial IRA filings, the beginning balance of net plant in service amount shall be \$22,955,825 as shown in **Attachment 2**.
  - d. For the initial IRA filing, the customer and consumption charges as noted in **Table 1** above will be the starting rates to which any IRA adjustment is applied.
  - e. Federal income taxes will be calculated using the statutory 21% rate, unless the federal corporate income tax rate is changed, in which case the new rate will be applied.
  - f. The base rate revenue allocation factors to spread any change in IRA increase/decrease to the appropriate customer classes are as follows:

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	Allocation
Residential	92.11%
Small Commercial	4.66%
Large Commercial	3.23%
Total Allocation	100.00%

38. Consistent with the Settlement, the following customer class allocation, customer counts, and volumes for base rates are reasonable:

Table 3

	Allocation	Customer Count	Volumes (Mcf)
Residential	92.11%	17,959	893,452
Small Commercial	4.66%	255	69,011
Large Commercial	3.23%	16	69,011
Total Allocation	100.00%	18,230	1,031,474

39. Consistent with the Settlement, \$6,596,833 in expenses related to test year services provided by affiliates to Consolidated UniGas that are included in the revenue requirement, and \$5,832,419 in expenses related to test year services provided by affiliates to Consolidated UniGas that are related to its cost of gas, are reasonable and necessary and recoverable consistent with the provisions in Texas Utilities Code § 104.055.
40. Applicants have established that the services provided by affiliates are reasonable and necessary costs of providing gas utility service and the prices charged to Consolidated UniGas are no higher than the prices charged by the supplying affiliate to other affiliates of Consolidated UniGas, or to a non-affiliated person for the same item or class of items.
41. It is reasonable that Consolidated UniGas decrease its recovery of the fee paid to its affiliate, Janix Energy Services, Inc., for marketing, balancing, and optimization services, from \$1.25 per MMBtu to \$1.14 per MMBtu, through its cost of gas adjustment mechanism reflected in Rate Schedule Cost of Gas included in Attachment 1, as a reasonable and necessary component of its cost of gas.
42. It is reasonable that Consolidated UniGas file a lead-lag study in its next Statement of Intent filed with the Commission under its original jurisdiction.
43. Consolidated UniGas established it has complied with the requirements set forth in the GUD No. 10695 Accounting Order (Feb. 27, 2018) and Order Nunc Pro Tunc (March 20, 2018) and its related filings were reasonable and accurate.
44. It is reasonable that Consolidated UniGas collect the Pipeline Safety and Regulatory Program Fee surcharge pursuant to 16 Tex. Admin. Code § 8.201 as an annual fee.
45. It is reasonable that Consolidated UniGas file an annual Pipeline Safety and Regulatory Program Compliance Filing with Staff no later than ninety (90) days after the last billing cycle in which the Pipeline Safety and Regulatory Program Fee is billed to customers.

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46. It is reasonable that Consolidated UniGas shall classify new capital investment utilizing project numbers and shall utilize project descriptions that accurately reflect the new capital investment activity contained in each project.
47. Consistent with the Settlement, Consolidated UniGas will create a Meals and Travel Policy in accordance with current Commission policy of \$25 per person per meal and \$175 per room per night in maximum recoverable expenses and will submit the policy to Commission Staff in a compliance filing within forty-five (45) days of the date of the Final Order.
48. It is reasonable that Consolidated UniGas retain all original invoices for purchases by Texas Gas Utility Services, Inc., in whole or in part to Consolidated UniGas.
49. It is reasonable that Consolidated UniGas may book, as a regulatory asset, \$202,900 of expenses related to its hydrostatic testing incurred in August 2020, to be amortized over a five-year period.
50. Pursuant to Tex. Util. Code § 104.006, it is reasonable that the rates established in this order for environs customers in Montgomery County may exceed 115% of the average of all rates for similar services in municipalities within Montgomery County served by Consolidated UniGas.
51. The proposed revisions to the Applicants' Cost Allocation Manual, as set forth in Exhibit JRB-3 to the direct testimony of Mr. J. Ross Buttermore, are just and reasonable.

***Rate Schedule Cost of Gas***

52. Consolidated UniGas' Cost of Gas ("COG") Tariff includes an installment charge—the "February 2021 Winter Event Installment Charge"—to account for the extraordinary high costs of natural gas caused by the 2021 Winter Weather Event incurred from February 13-19, 2021.
53. Consistent with the Settlement, Consolidated UniGas shall be entitled to book a separate regulatory asset associated with its carrying costs based on its cost of long-term debt—5.31 percent—associated with any unrecovered monthly balance of its principal or carrying costs related to the February 2021 Winter Event Regulatory Asset ("February 2021 Winter Event Carrying Costs"). It is reasonable that the recovery mechanism for the February 2021 Winter Event Carrying Costs will be set in a subsequent proceeding.
54. Consistent with the Settlement, the February 2021 Winter Event Regulatory Asset, exclusive of the February 2021 Winter Event Carrying Costs, shall be amortized and recovered from customers in installments, separate from the other charges and adjustments authorized in this Rate Schedule COG.
55. It is reasonable that the February 2021 Winter Event Regulatory Asset be amortized in equal installments over a period of 18 months ("Fixed Monthly Recovery Installment").
56. It is reasonable that the installment charge amortizes approximately \$29,685,706 over 18 months into a regulatory asset and that the installment charge be volumetric based.
57. Consistent with the Settlement, the volumetric-based installment charge for each of the 18 months shall be computed by dividing the Fixed Monthly Recovery Installment to be recovered from customers in that calendar month by Consolidated UniGas' total volumes of gas sold to general service customers in the calendar month subject to that bill. The resulting

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amount per Mcf shall then be multiplied by the customer's actual gas usage in Mcf during that month to determine the customer's total installment charge amount owed for that month.

58. Consolidated UniGas is willing to participate in alternative measures to reduce costs on customers. It is reasonable that Consolidated UniGas will closely monitor ongoing legislative efforts to pass legislation that will allow some form of securitization of the extraordinary costs incurred from the 2021 Winter Weather Event to provide for a longer-term recovery of these costs from customers in smaller monthly amounts. Consolidated UniGas intends to participate in such a program if passed.

#### **Rate Case Expenses**

59. The Settlement will significantly reduce the amount of reimbursable rate case expenses associated with this docket.
60. Consolidated UniGas has each established that its rate case expenses for OS-20-00004865 incurred through December 31, 2020 are as follows:

**Table 4.**

<b>Actual Regulatory Expenses</b>	<b>Actual Litigation Expenses</b>	<b>Total Recoverable Expenses Requested for Recovery</b>
\$525,968.84	\$244,605.51 (actual);  \$145,316.62 (requested for recovery)	\$671,285.46

61. Consolidated UniGas has established that its total recoverable rate case expenses of \$671,285.46, which consist of \$525,968.84 in actual regulatory expenses and \$145,316.62 in actual litigation expenses requested for recovery, are just and reasonable.
62. The hourly rates charged by attorneys and consultants were reasonable rates charged by firms in cases addressing utility rate matters.
63. The attorneys and consultants did not charge any expenses for luxury items and did not incur any excessive airline, lodging, or meal expenses.
64. The amount of work completed and the time and labor required to accomplish the work were reasonable given the nature of the issues addressed.
65. The complexity and expense of the work was relevant and reasonably necessary to the proceeding and was commensurate with both the complexity of the issues and necessary to completing the matter before the Commission.
66. It is reasonable that the recovery of \$671,285.46 in total rate case expenses be recovered over an approximately 60-month period and that the surcharge be volume-based in an amount of \$0.130 per Mcf as set forth in Rate Schedule RCE in **Attachment 1**.
67. It is reasonable that Consolidated UniGas file an annual Rate Case Expense Compliance Filing with the Commission Oversight and Safety Division, referencing OS-20-00004865. The compliance filing shall include the volumes used by month by customer class during the applicable period, the amount of rate case expense recovered by month, and the outstanding balance by month as set out in the approved Rate Schedule RCE, in **Attachment 1**.

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68. It is reasonable that Consolidated UniGas file an annual Rate Case Expense Compliance Filing with Commission Staff detailing the balance of actual plus estimated rate case expenses at the beginning of the annual period, the amount collected by customer class, and the ending or remaining balance within ninety (90) days after each calendar year end until and including the calendar year end in which the rate case expenses are fully recovered.
69. The tariffs and rate schedules attached to this Final Order in Attachment 1 are just and reasonable.

#### CONCLUSIONS OF LAW

1. Each of the Applicants is a gas utility as defined in Tex. Util. Code §§ 101.003(7) and 121.001 and are therefore subject to the jurisdiction of the Commission.
2. The Commission has jurisdiction over Applicants and the SOI under Tex. Util. Code §§ 102.001, 104.001, and 104.002.
3. Under Tex. Util. Code § 102.001, the Commission has exclusive original jurisdiction over the rates and services of a gas utility within the environs areas the Applicants serve.
4. This proceeding was conducted in accordance with the requirements of Tex. Util. Code §§ 101.001, *et seq.*, and the Administrative Procedure Act, Tex. Gov't Code §§ 2001.001 *et seq.*
5. The proposed rates constitute a major change as defined by Tex. Util. Code § 104.101.
6. Tex. Util. Code § 104.107 provides the Commission's authority to suspend the operation of the schedule of proposed rates for 150 days from the date the schedule would otherwise go into effect.
7. Proper notice was given consistent with Tex. Util. Code § 104.103 and 16 Tex. Admin. Code §§ 7.230 and 7.235.
8. Applicants filed the SOI in accordance with Tex. Util. Code § 104.102 and 16 Tex. Admin. Code §§ 7.205 and 7.210.
9. Applicants met the burden of proof in accordance with the provisions of Tex. Util. Code § 104.008 on the elements of its requested rate increase identified in this Order.
10. The revenue, rates, rate design, and service fees identified in the schedules attached to this Order are just and reasonable, are not unreasonably preferential, prejudicial, or discriminatory, and are sufficient, equitable, and consistent in application to each class of consumer, as required by the Texas Utilities Code.
11. The overall revenues as established by the findings of fact and appended schedules in Attachment 1 are reasonable; fix an overall level of revenues for Consolidated UniGas that will permit it a reasonable opportunity to earn a reasonable return on its invested capital used and useful in providing service to the public over and above its reasonable and necessary operating expenses, as required by Tex. Util. Code § 104.051; and otherwise comply with Chapter 104 of the Texas Utilities Code.

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12. The revenue, rates, rate design, and service fees proposed will not yield to Consolidated UniGas more than a fair return on the adjusted value of the invested capital used and useful in rendering service to the public, as required by Tex. Util. Code § 104.052.
13. The rates established in this docket comport with the requirements of Tex. Util. Code §104.053 and are based upon the adjusted value of invested capital used and useful, where the adjusted value is a reasonable balance between the original cost less depreciation and current cost less an adjustment for present age and condition.
14. The tariffs and rate schedules included as **Attachment 1** comply with Chapter 104 of the Texas Utilities Code and 16 Tex. Admin. Code § 7.5519.
15. The rates established in this case comply with the affiliate transaction standard set out in Tex. Util. Code § 104.055.
16. Applicants met their burden in proving the reasonableness of their rate case expenses pursuant to 16 Tex. Admin. Code § 7.5530.
17. Applicants have complied with the requirements set forth in the GUD No. 10695 Accounting Order (Feb. 27, 2018) and Order Nunc Pro Tunc (March 20, 2018).
18. Consolidated UniGas is required by 16 Tex. Admin. Code § 7.315 to file electronic tariffs incorporating rates consistent with this Order within thirty days of the date of this Order.
19. Consolidated UniGas has established that its books and records conform with 16 Tex. Admin. Code § 7.310 to utilize FERC's USOA prescribed for Natural Gas Applicants, and Consolidated UniGas is therefore entitled to the presumption that the amounts included therein are reasonable and necessary in accordance with 16 Tex. Admin. Code §7.503.

**IT IS THEREFORE ORDERED** that the proposed schedule of rates and tariffs for Consolidated UniGas as reflected in the Order and in **Attachment 1** are hereby **APPROVED**.

**IT IS FURTHER ORDERED** that the Depreciation Rates and Net Plant in Service for Consolidated UniGas, as reflected in **Attachment 2**, is **APPROVED**

**IT IS FURTHER ORDERED** that the factors established for future Interim Rate Adjustment filings in **Finding of Fact No. 37** are **APPROVED**.

**IT IS FURTHER ORDERED** that the terms of the Settlement Agreement, as reflected in this Final Order, are hereby **APPROVED**.

**IT IS FURTHER ORDERED** that Consolidated UniGas retain all original invoices for purchases by Texas Gas Utility Services, Inc., that are allocated in whole or in part to Consolidated UniGas.

**IT IS FURTHER ORDERED** that Consolidated UniGas shall classify new capital investment utilizing project numbers and shall utilize project descriptions that accurately reflect the new capital investment activity contained in each project.

**IT IS FURTHER ORDERED** that Consolidated UniGas, within forty-five (45) days of the date of this Order, shall create and submit a Meals and Travel Policy Compliance Filing with Staff.

**IT IS FURTHER ORDERED** that Consolidated UniGas create a Meals and Travel Policy in accordance with current Commission policy of \$25 per person per meal and \$175 per room per night

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in maximum recoverable expenses. Consolidated UniGas will submit the policy to Staff in a compliance filing within forty-five (45) days of the date of the Final Order.

**IT IS FURTHER ORDERED** that Consolidated UniGas file an annual Rate Case Expense Compliance Filing with Staff detailing recovery of rate case expenses as described in **Finding of Fact No. 66** within ninety (90) days after each calendar year end (with the first such filing due on or before April 1, 2022) until and including the calendar year end in which the rate case expenses are fully recovered.

**IT IS FURTHER ORDERED** that within thirty (30) days of this Final Order, in accordance with 16 Tex. Admin. Code § 7.315, Consolidated UniGas SHALL electronically file its rate schedules in proper form that accurately reflect the rates in Attachment 1 approved in this Final Order.

**IT IS FURTHER ORDERED** that any incremental change in rates approved by this Final Order and implemented by Consolidated UniGas shall be subject to refund unless and until Consolidated UniGas' tariffs are electronically filed and accepted by the Gas Services Department in accordance with 16 Tex. Admin. Code § 7.315.

**IT IS FURTHER ORDERED** that Consolidated UniGas file an annual Pipeline Safety and Regulatory Program Compliance Filing with Staff no later than ninety (90) days after the last billing cycle in which the Pipeline Safety and Regulatory Program Fee is billed to customers.

**IT IS FURTHER ORDERED** that Consolidated UniGas must file a lead-lag study in its next Statement of Intent filing filed before the Commission under its original jurisdiction.

**IT IS FURTHER ORDERED** Consolidated UniGas decrease its recovery of the fee paid to its affiliate, Janix Energy Services, Inc., for marketing, balancing, and optimization services, from \$1.25 per MMBtu to \$1.14 per MMBtu, through its cost of gas adjustment mechanism reflected in Rate Schedule Cost of Gas ("COG") included in Attachment 1, as a reasonable and necessary component of its cost of gas.

**IT IS FURTHER ORDERED** that in the event legislation is passed that allows for some form of securitization of Consolidated UniGas' 2021 Winter Weather Event costs, Consolidated UniGas will participate in those measures to provide for a longer-term recovery of those costs from customers in smaller monthly amounts.

**IT IS FURTHER ORDERED** that in the event Consolidated UniGas participates in a securitization of its February 2021 Winter Event Regulatory Asset, the February 2021 Winter Event Installment Charge shall terminate with respect to the portion of the February 2021 Winter Event Regulatory Asset so securitized.

**IT IS FURTHER ORDERED** that the revised Cost Allocation Manual attached as Exhibit JRB-3 to the direct testimony of J. Ross Buttermore is hereby **APPROVED**.

**IT IS FURTHER ORDERED** that all proposed findings of fact and conclusions of law not specifically adopted in this Order are hereby **DENIED**.

**IT IS FURTHER ORDERED** that all pending motions and requests for relief not previously granted or granted herein are hereby **DENIED**.

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**IT IS FURTHER ORDERED** that this order shall not be final and effective until 25 days after this Order is signed, unless the time for filing a motion for rehearing has been extended under Tex. Gov't Code § 2001.142, by agreement under Tex. Gov't Code § 2001.147, or by written Commission Order issued pursuant to Tex. Gov't Code § 2001.146(e). If a timely motion for rehearing of an application is filed by any party at interest, this Order shall not become final and effective until such motion is overruled, or if such motion is granted, this Order shall be subject to further action by the Commission. Pursuant to Tex. Gov't Code § 2001.146(e) and 16 Tex. Admin. Code § 1.128(e), the time allotted for Commission action on a motion for rehearing in this case prior to its being overruled by operation of law is hereby extended until 100 days from the date this Order is signed.

**SIGNED** on April 13, 2021.

**RAILROAD COMMISSION OF TEXAS**

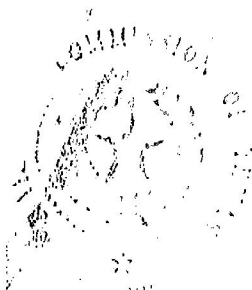
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**SECRETARY**





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**OS-20-00004865**  
**Final Order**  
**Attachment 1**  
**(Rate Schedules and Tariffs)**

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**UNIVERSAL NATURAL GAS, LLC D/B/A UNIVERSAL NATURAL GAS, INC.**  
**RESIDENTIAL SERVICE**  
**RATE SCHEDULE RES**

**AVAILABILITY**

This schedule is available to residential consumers receiving natural gas service from UNIGAS (hereinafter called "Company").

**APPLICATION OF SCHEDULE**

The Company will provide distribution service for the delivery of gas supply through the Company's facilities to eligible residential customers residing in single family or multi-unit residential dwellings in which each unit requires a separate connection and meter. Gas supplied hereunder is for the individual use of the Consumer at one point of delivery and shall not be resold or shared with others. If the Consumer has a written contract with Company, the terms and provisions of such contract shall be controlling.

**BASE MONTHLY RATE**

For bills rendered on and after the effective date of this rate schedule, the monthly billing period rate for each customer receiving service under this rate schedule shall be the sum of the following:

Monthly Customer Charge:	\$18.00
All Gas Consumed at:	\$3.14 per Mcf

**OTHER ADJUSTMENTS**

Cost of Gas Component: The basic rates for cost of service set forth above shall be increased by the amount of the Cost of Gas Component for the billing month computed in accordance with the provisions of Rate Schedule COG.

Taxes: Plus applicable taxes and fees related to above in accordance with the provisions of Rate Schedule TAXES.

Pipeline Safety Inspection Fee: The billing shall reflect adjustments in accordance with provisions of the Pipeline Safety Inspection Fee, Rate Schedule PSFUG.

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Weather Normalization Adjustment: The billing shall reflect adjustments in accordance with the provisions of the Weather Normalization Adjustment Clause, Rate Schedule WNA.

Rate Case Expense Rider: Adjustments in accordance with provisions of the Rate Case Expense Surcharge Rider, Rate Schedule RCE.

Miscellaneous Service Charges: The billing shall reflect adjustments in accordance with provisions of the Miscellaneous Service Charges, Rate Schedule M.

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**UNIVERSAL NATURAL GAS, LLC D/B/A UNIVERSAL NATURAL GAS, INC.**  
**COMMERCIAL SERVICE**  
**RATE SCHEDULE COMM**

**AVAILABILITY**

This schedule is available to commercial and other non-residential (hereinafter called "Commercial") customers receiving natural gas service from UNIGAS (hereinafter called "Company").

**APPLICATION OF SCHEDULE**

The Company will provide distribution service for the delivery of gas supply through the Company's facilities to eligible Commercial customers in which each unit requires a separate connection and meter. Gas supplied hereunder is for the individual use of the Customer at one point of delivery and shall not be resold or shared with others. If the Customer has a written contract with Company, the terms and provisions of such contract shall be controlling.

**BASE MONTHLY RATE**

For bills rendered on and after the effective date of this rate schedule, the monthly billing period rate for each customer receiving service under this rate schedule shall be the sum of the following:

<b><u>UNIGAS – COMMERCIAL TARIFF MATRIX</u></b>				
<b><u>COMMERCIAL CUSTOMER DESCRIPTION</u></b>	<b><u>MONTHLY CONSUMPTION CRITERIA</u></b>		<b><u>BASE COMMERCIAL TARIFF RATES</u></b>	
	<b><u>Equal to or Greater Than:</u></b>	<b><u>Less Than or Equal to:</u></b>	<b><u>Monthly Meter Charge</u></b>	<b><u>Commodity Charge</u></b>
Small Commercial	0.0 Mcf/Mth.	150.0 Mcf/Mth.	\$45.00/Mth.	\$2.91/Mcf
Large Commercial	150.1 Mcf/Mth.	N/A	\$175.00/Mth.	\$2.91/Mcf

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#### **OTHER ADJUSTMENTS**

Cost of Gas Component: The basic rates for cost of service set forth above shall be increased by the amount of the Cost of Gas Component for the billing month computed in accordance with the provisions of Rate Schedule COG.

Pipeline Safety Inspection Fee: The billing shall reflect adjustments in accordance with provisions of the Pipeline Safety Inspection Fee, Rate Schedule PSFUG.

Taxes: Plus applicable taxes and fees related to above in accordance with the provisions of Rate Schedule TAXES.

Rate Case Expense Rider: Adjustments in accordance with provisions of the Rate Case Expense Surcharge Rider, Rate Schedule RCE.

Miscellaneous Service Charges: The billing shall reflect adjustments in accordance with provisions of the Miscellaneous Service Charges, Rate Schedule M.

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**UNIVERSAL NATURAL GAS, LLC D/B/A UNIVERSAL NATURAL GAS, INC.**  
**WEATHER NORMALIZATION ADJUSTMENT (WNA)**  
**RATE SCHEDULE WNA**

- The Weather Normalization Factor (WNF) is a factor that adjusts the Volumetric Fee for each 100 cubic feet (Ccf) of natural gas sold. The WNF is designed to refund over-collections and to surcharge for under-collections of revenue due to colder than normal or warmer than normal weather. In order to reflect weather variances in a timely and accurate manner, the WNF is calculated monthly and is based on monthly weather information for the three-month period beginning with December and ending with February. The Weather Normalization Factor shall apply only to residential customers, and for purposes of this WNF, the Company will designate residential customers into either the Conroe Area or New Braunfels/San Antonio Area, as applicable, based on meter location.

Formula. The WNF is calculated, as follows:

[Adjusted Heating Load plus Base Non-Heating Load] divided by Total Volumes Sold

Where: Adjusted Heating Load (Ccf) = Heating Load divided by HDD Factor

AvgHDD = Average heating degree-days for a calendar month as measured by the National Oceanic and Atmospheric Administration (NOAA) for the period 2009 through 2019 at their weather station in Conroe, Texas or San Antonio, Texas, as applicable. The AvgHDD values used to calculate the WNF are:

For the Conroe Weather Station: December 387, January 461.65, February 295.75

For the San Antonio Weather Station: December 321.9, January 373.99, February 237.05

Base Non-Heating Load (Ccf) = Base load factor x the number of bills issued for each class where base load factors are as follows:

Conroe Area Residential – 12.28 Ccf

New Braunfels/San Antonio Area Residential – 12.28 Ccf

Bills = Number of bills issued to customers for gas sold that month

HDD = A heating degree day is a measurement of demand for energy to heat houses and businesses. The WNF is based upon actual heating degree-days for a calendar month as measured by the NOAA at their weather station located in Conroe, Texas or San Antonio, Texas, as applicable.

HDD Factor (Heating Degree-Day Factor) = HDD divided by AvgHDD  
Heating Load (Ccf) = Total Volumes Sold minus Base Non-Heating Load