

**DOCKET NO. 39868**

**EL PASO ELECTRIC COMPANY'S            §                            BEFORE THE**  
**PETITION FOR REVIEW OF THE        §                            PUBLIC UTILITY**  
**CITY OF EL PASO'S RATE             §                            COMMISSION OF TEXAS**  
**RESOLUTIONS                            §**

**EL PASO ELECTRIC COMPANY'S RESPONSE TO THE**  
**CITY OF EL PASO'S MOTION TO DISMISS FOR LACK OF JURISDICTION**

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**EL PASO ELECTRIC COMPANY'S RESPONSE TO THE  
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El Paso Electric Company ("EPE" or the "Company") files its Response to the City of El Paso's (the "City") Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss") and asks that the Motion to Dismiss be denied.

**I. INTRODUCTION**

As Commission Staff correctly concludes in its *Response to the City of El Paso's Motion to Dismiss for Lack of Jurisdiction* ("Staff's Response"),<sup>1</sup> § 32.001(b) of the Public Utility Regulatory Act ("PURA") grants the Commission explicit authority to hear EPE's appeal.<sup>2</sup> The City's Motion to Dismiss does not dispute this fact. Nor does the City's Motion to Dismiss dispute that the Legislature has conferred broad powers on the Commission in order to assure PURA's stated goal of establishing a "comprehensive and adequate regulatory system for public utilities."<sup>3</sup> Instead, the City chooses to focus on a single provision of PURA, Section 33.051, to argue that the Commission lacks jurisdiction to hear EPE's appeal because the City has not made a "final decision" on EPE's rates. As suggested in Staff's Response, the City's Motion to Dismiss misses the mark and should be denied.

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<sup>1</sup> Commission Staff's Response to the City of El Paso's Motion to Dismiss for Lack of Jurisdiction at 11 (Nov. 16, 2011).

<sup>2</sup> TEX. UTIL. CODE § 32.001(b) ("The commission has exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising exclusive jurisdiction under this subtitle.").

<sup>3</sup> See *City of Allen v. Pub. Util. Comm'n of Tex.*, 161 S.W.3d 195, 208 (Tex. App.—Austin 2005, no pet.); *Appeal of TXU Electric Delivery Company from an Ordinance of the City of University Park and Request for Interim Relief*, Order at 2 (Oct. 24, 2007).

## II. ARGUMENT

### A. **The Commission Has Explicit Authority Under § 32.001(b) of PURA to Consider This Appeal.**

In its Petition for Review, EPE asks the Commission to exercise its general authority to review a municipal “order” or “ordinance” under § 32.001(b) of PURA. Remarkably, the City’s Motion to Dismiss fails to address the jurisdictional authority granted to the Commission under § 32.001(b) of PURA. The City also ignores that the Legislature has specifically directed the Commission to exercise its broad and comprehensive powers to ensure regulatory uniformity – a directive that, by necessity, empowers the Commission with jurisdiction to review municipal orders affecting electric utilities.<sup>4</sup> Instead, the City’s Motion to Dismiss discusses a statutory provision that EPE *never mentions* in its Petition for Review, § 33.051 of PURA, and argues that jurisdiction does not lie under that provision. Then, using the “strawman” it tries to create out of § 33.051, the City claims that the Commission does not have jurisdiction because the City has not made a “final decision” concerning EPE’s rates.<sup>5</sup>

In short, EPE agrees that the Commission’s jurisdiction in this appeal does not lie under § 33.051 of PURA. This is because § 33.051 speaks only to the ability of a party to appeal a municipality’s “final” rate determination. Under § 32.001(b) of PURA, however, the Commission “has exclusive appellate jurisdiction to review any order or ordinance of a municipality exercising original jurisdiction under this subtitle.”<sup>6</sup> There is no requirement that a

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<sup>4</sup> TEX. UTIL CODE § 11.002(a); *See also City of Allen*, 161 S.W.3d at 208.

<sup>5</sup> Motion to Dismiss at 2.

<sup>6</sup> TEX. UTIL CODE § 32.001(b); *See also City of Allen*, 161 S.W.3d at 207.

“final decision” be issued under § 32.001(b),<sup>7</sup> nor is there a requirement that the order or ordinance set rates, or even that the order or ordinance relate to utility rates.

In fact, the Supreme Court of Texas recently reached a similar conclusion in analyzing the language of § 102.001(b) of the Gas Utility Regulatory Act (“GURA”), the language of which mirrors the wording of § 32.001(b) of PURA exactly. In *Atmos Energy Corporation v. Cities of Allen*, No. 10-0375, the Supreme Court was confronted with whether the Railroad Commission of Texas (“Railroad Commission”) had authority to hear an appeal from a municipality’s denial of a gas utility’s interim rate (“GRIP”) adjustment filing. The District Court had determined that the Railroad Commission lacked jurisdiction over any appeals stemming from those denials, and the Third Court of Appeals affirmed.<sup>8</sup> Reversing both lower courts, the Supreme Court cited the explicit language in GURA § 102.001(b) giving the Railroad Commission exclusive appellate jurisdiction over an appeal from an “order or ordinance of a municipality exercising exclusive original jurisdiction,” and held that the Railroad Commission’s appellate jurisdiction was clear.<sup>9</sup> The Court also noted that the construction urged by the District Court and Third Court of Appeals might result in “leaving a lengthy and expensive contested rate case as the only recourse to effect a rate adjustment to recoup infrastructure investment” – a policy issue also implicated by the facts in this case.<sup>10</sup>

In sum, all that is required under § 32.001(b) is that an order or ordinance be passed by a municipality that is exercising its original jurisdiction. Accordingly, the City’s arguments that jurisdiction does not lie until it reaches a “final” decision, that EPE’s appeal is “premature,” and

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<sup>7</sup> As noted in Staff’s Response, the Third Court of Appeals has interpreted PURA’s definition of an “order to include a number of preliminary actions by regulatory authorities. See Staff’s Response at 6.

<sup>8</sup> *Atmos Energy Corp. v. The Cities of Allen*, No. 10-0375, 2011 WL 5601803, at \*4 (Tex. Nov. 18, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

that the ordinance is not a “rate order” are irrelevant.<sup>11</sup> There are no such requirements or restrictions under § 32.001(b).

**B. The City’s Motion to Dismiss Mischaracterizes the Manner in Which the Commission and Texas Courts Have Interpreted Jurisdiction Under PURA.**

In addition to ignoring the relevant jurisdictional statute, the City’s Motion to Dismiss also paints an inaccurate picture of relevant Commission precedent. As Staff’s Response notes, the City takes some liberties in construing the findings of the Administrative Law Judge (“ALJ”) in Docket No. 38480, *Application of Texas New-Mexico Power Company for Authority to Change Rates*.<sup>12</sup> More pointedly, the City also ignores precedent that is directly relevant to EPE. For instance, in Docket No. 2141, EPE filed a petition with the Commission requesting review of a City of El Paso ordinance that required EPE to refund approximately \$6 million in past fuel adjustment charges.<sup>13</sup> Similar to this case, the City filed a motion to dismiss alleging that the Commission lacked jurisdiction to hear EPE’s appeal.<sup>14</sup> The ALJ denied the City’s motion.<sup>15</sup> In fact, the Commission eventually rescinded and set aside the refund ordinance.<sup>16</sup> Crucial to the Commission’s decision were its findings that it had the general power to regulate and supervise the business of every public utility within its jurisdiction, to do all things necessary and convenient to the exercise of that jurisdiction, and that it had exclusive appellate jurisdiction over

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<sup>11</sup> The City also makes an argument that the Commission cannot exercise appellate jurisdiction when the entity having original jurisdiction has taken no action. This is wrong for two reasons. First, this argument again relies on the notion that only a final decision can be appealed to the Commission, which is not the case under § 32.001(b). Second, the City *has* acted—it is requiring EPE to compile and file a rate case by February 1, 2012. On November 15 the City also established temporary rates for EPE – thereby signaling the City’s firm decision to require all the necessary, formidable, and expensive tasks associated with presenting a full blown rate case. In short, the City clearly “acted” when it ordered EPE to file a rate case barely 15 months after the last rate case was settled by all parties, including the City.

<sup>12</sup> See Staff’s Response at 10.

<sup>13</sup> Docket No. 2141, *Petition for Review by El Paso Electric Company From Refund Motion Passed by the City of El Paso*, Petition for Review (Sep. 13, 1978).

<sup>14</sup> Docket No. 2141, City’s Motion to Dismiss and Answer (Sep. 20, 1978).

<sup>15</sup> Docket No. 2141, Prehearing Order and Notice of Hearing at 1 (Jan. 30, 1979).

<sup>16</sup> Docket No. 2141, Final Order at 8 (Jan. 31, 1980).

municipal rate ordinances.<sup>17</sup>

In the same vein, the City misstates the findings of *City of Allen v. Public Utility Commission of Texas*. Specifically, the City claims that the court in *City of Allen* struck down a municipal order because it conflicted with PURA “in an area in which the Commission had original jurisdiction.”<sup>18</sup> That is incorrect. In *City of Allen*, the court upheld the Commission’s reversal of a municipal order ***based on the Commission’s appellate jurisdiction under PURA § 32.001(b)***.<sup>19</sup> Notably, the City agrees that the two resolutions appealed by EPE were exercises by the City of the City’s exclusive original jurisdiction under PURA. Moreover, both resolutions clearly cite provisions of PURA and claim that “the City of El Paso is a regulatory authority having exclusive original jurisdiction over the rates, operations and services of an electric utility within the areas of the city limits.” The only remaining question, then, is whether each of the resolutions constitutes an “order” or “ordinance.”

To this end, the City’s argument, citing § 33.051 for the proposition that EPE may only appeal a “final decision,” has been flatly rejected by Texas courts. As correctly noted in Staff’s Response, in *Texas Association of Long Distance Telephone Companies*, the appellant utilities argued that the term “order” meant a final and appealable order.<sup>20</sup> The court disagreed. Citing a definition of “order” now found in PURA § 11.003(13), the court held that the appellant’s proposed definition was “too narrow” and that an “order” under PURA “does not even require that an order resolve all issues (*i.e.* be a final order).”<sup>21</sup> The court even noted that the term could

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<sup>17</sup> *Id.* at Conclusions of Law 1 and 3.

<sup>18</sup> City’s Motion to Dismiss at 6.

<sup>19</sup> *City of Allen*, 161 S.W.3d at 212.

<sup>20</sup> *Tex. Assoc. of Long Distance Tel. Cos. (TEXALTEL) v. Pub. Util. Comm’n of Tex.*, 798 S.W.2d 875, 884 (Tex. App.—Austin 1990, writ denied).

<sup>21</sup> *Id.* at 885.

include an interlocutory order.<sup>22</sup> In sum, the two resolutions at issue are municipal orders enacted by the City exercising its original jurisdiction and, as such, are subject to appeal to the Commission under § 32.001(b).

**C. EPE Is Not Asking the Commission to “Preempt” the City’s Original Jurisdiction.**

The City’s argument that the Commission’s acceptance of EPE’s appeal would somehow “preempt” its original jurisdiction is also incorrect. As the Third Court of Appeals has made clear, the Commission’s appellate jurisdiction does not usurp that of a city, but a city’s powers may be necessarily restricted by the Commission. “[A city’s] power to legislate for its own benefit is limited by the Commission’s regulatory authority under PURA, which is itself an exercise of police power in the interest of all Texas citizens.”<sup>23</sup> This is consistent with PURA’s stated purpose: “[T]o establish a *comprehensive* and adequate regulatory system for public utilities.”<sup>24</sup> It is also a logical necessity given the Legislature’s direction to facilitate regulatory uniformity and implement system-wide rates<sup>25</sup> and is consistent with Commission precedent specific to EPE.<sup>26</sup> To this end, EPE’s Petition for Review does not ask the Commission to wrestle original jurisdiction away from the City. Rather, it asks that the Commission exercise its authority to review two ordinances wherein the City violated § 33.004(b) of PURA.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 209.

<sup>24</sup> See *City of Allen*, 161 S.W.3d at 208; Docket No. 33743, *Appeal of TXU Electric Delivery Company from an Ordinance of the City of University Park and Request for Interim Relief*, Order at 2 (Oct. 24, 2007) (emphasis added).

<sup>25</sup> *Id.* (citing Dan Pleitz, et al., *Municipalities and the Public Utility Regulatory Act*, 28 Baylor L. Rev. 977, 978 (1976)); *Tex.-New Mex. Power Co.*, 806 S.W.2d at 232.

<sup>26</sup> See Docket No. 2141, *Petition for Review by El Paso Electric Company From Refund Motion Passed by the City of El Paso*, Final Order at 8 (Jan. 31, 1980).

**D. The Commission Has Jurisdiction to Enforce Its Final Order Rendered in Docket No. 37690.**

EPE notes that the Commission also has jurisdiction in this proceeding to enforce the order it issued in EPE's last rate proceeding, Docket No. 37690.<sup>27</sup> In fact, the Third Court of Appeals has noted the "well-recognized regulatory concept" that an agency is bound by its previous decision absent a showing of "changed circumstances."<sup>28</sup> As discussed in EPE's Petition for Review, circumstances have not materially changed such that the rates the Commission put in place just over a year ago are no longer just and reasonable from the regulatory authority's perspective. Therefore, the Commission's order remains in place and is enforceable absent a showing of changed circumstances. Indeed, Staff's Response recognizes that a crucial piece of the fact-finding in this case will revolve around whether the City followed the Commission's established standard for evaluating whether to proceed with a rate review that was not initiated by the utility. While that fact-finding occurs, the Commission is entitled to enforce its order in Docket No. 37690, which again, preserves system-wide rates.

**E. The Issues in EPE's Appeal Are Ripe for Consideration.**

Finally, the City argues that issues raised in the Company's Petition for Review are not yet ripe. The City is again incorrect and again fails to conduct an analysis of the relevant case law. In addressing the issue of whether a claim is ripe for adjudication, the Commission has

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<sup>27</sup> The Commission approved system-wide rates for EPE's service territory pursuant to a unanimous settlement agreed to and signed by the City and all other parties in Docket No. 37690, *Application of El Paso Electric Company to Change Rates, to Reconcile Fuel Costs, to Establish Formula-Based Fuel Factors, and to Establish an Energy Efficiency Cost Recovery Factor*, and approved by the Commission on July 30, 2010. Pursuant to this same settlement agreement, the City approved the same system-wide rates for electric utility service within the City in a rate resolution issued in June 2010. In executing the settlement agreement that was entered in Docket No. 37690, the City, as a party to that case and signatory to the settlement agreement, became bound by its terms and subject to the Commission's enforcement authority.

<sup>28</sup> *West Tex. Util. Co. v. Office of Pub. Util. Counsel*, 896 S.W.2d 261, 269 (Tex. App.—Austin 1995, pet. withdrawn).



relied on the test adopted by the Texas Supreme Court.<sup>29</sup> That test requires the evaluation of: (1) fitness of the issues for judicial decision; and (2) hardship to the parties of withholding judicial review.<sup>30</sup> As noted above, § 32.001(b) clearly provides—and Commission precedent soundly supports—the Commission with authority to review the ordinances in question and to determine whether, in passing the ordinances, the City failed to follow Commission standards.<sup>31</sup> Put differently, under § 32.001(b) the issues in this case were fit for decision the minute the City passed an ordinance requiring EPE to file a rate case. As to the second prong of the test, the City’s intent in this case is crystal clear. It seeks to change rates a mere 15 months after the Company’s last rate case was settled by all parties, including the City. That intent was confirmed by the City’s passing of a temporary rate ordinance on November 15 and necessarily forces EPE to incur the substantial expense associated with putting together a rate filing package. No party disputes this fact. Nor is this fact “speculative” or an “opinion of what may happen” as alleged by the City – these are real costs that will ultimately be borne by EPE customers.<sup>32</sup> Similarly, the City does not dispute that market uncertainty resulting from the City’s actions may result in a downgrade of EPE’s credit rating. The City’s ripeness argument should be rejected.

**F. The Commission Should Exercise Its Jurisdiction and Deny the Motion to Dismiss.**

Finally, as Staff’s Response aptly notes, the Commission has the authority in this case to ensure “regulatory uniformity and certainty within PURA’s two-tiered regulatory system.”<sup>33</sup> In

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<sup>29</sup> See Docket No. 36763, *Complaint of Cermac Energy Corporation Regarding Certain Qualifying Facilities Under PURPA, Nomansland I, Nomansland II, Goodwell Wind I and Goodwell Wind II, Against Southwestern Public Service Company*, Order No. 12 at 2-3 (Jul. 10, 2007) (citing *Perry v. Del Rio*, 66 S.W.3d 239, 250, 253 (Tex. 2001)).

<sup>30</sup> *Id.*

<sup>31</sup> See also Docket No. 36763, Order No. 12 at 3 (citing *Tex. Ct Reporters Cert. Bd v. Esquire Deposition Servs., L.L.C.*, 240 S.W.3d 79, 92-93 (Tex. App.—Austin 2007, no pet.)); *City of Waco v. Tex. Nat’l Resources Conservation Comm’n*, 83 S.W.3d 169, 175 (Tex. App.—Austin 2002, pet. denied) (“In determining whether a cause is ripe for judicial consideration, we look to see whether the facts have sufficiently developed to show that an injury has occurred, or is likely to occur.”).

<sup>32</sup> *Id.*

<sup>33</sup> Staff’s Response at 8.

this regard, the policy implications presented in this case are substantial. The City has issued a temporary rate ordinance that, upon issuance of a final order in the City-initiated rate proceeding, will likely require EPE to charge different rates to customers within the City versus customers within the Cities of Anthony, Clint, Horizon, Socorro, Vinton, and Van Horn and the surrounding environs areas. Under these circumstances, the only way to protect the public interest inherent in the application of uniform system-wide rates is for the Commission to exercise its jurisdiction and hear EPE's appeal.

### **III. CONCLUSION AND PRAYER**

For these reasons, EPE requests that the Commission deny the City's Motion to Dismiss. EPE requests any other relief to which it may be entitled.

Respectfully submitted,

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**ATTORNEYS FOR EL PASO ELECTRIC  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding on November 22, 2011 via first class mail, hand delivery, or facsimile.

  
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Ann M. Coffin