

**PUC DOCKET NO. 39868**

**PETITION OF EL PASO ELECTRIC  
COMPANY FOR REVIEW OF THE  
CITY OF EL PASO'S RATE  
RESOLUTIONS**

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§  
§

**BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS**

**CITY OF EL PASO'S RESPONSE TO EL PASO ELECTRIC COMPANY'S  
MOTION FOR INTERIM ORDER TO IMMEDIATELY STAY  
THE RATE PROCEEDING INITIATED BY THE CITY OF EL PASO**

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**NOVEMBER 29, 2011**

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**TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:**

On November 18, 2011, El Paso Electric Company ("EPE") filed a motion ("Motion") to immediately stay the proceeding the City of El Paso ("City") initiated October 4, 2011. This Response is timely filed on the fifth working day after EPE's Motion was filed. The City of El Paso respectfully urges the Commission to deny EPE's Motion for the reasons set forth herein.

**I. INTRODUCTION**

EPE's Motion is nothing more than an effort by EPE to re-urge the request it made in its original appeal filed on October 27, 2011. The Motion does not assert any additional facts or theories that would entitle EPE to the interim relief it requests. The Motion is not supported by any affidavits, nor is it supported in PURA or the precedents cited by EPE. The Commission should deny the Motion.

In the City's Motion to Dismiss and its Response previously in this docket, the City set out its position that the appeal by EPE is simply not ripe. The proceedings related to the City's inquiry under PURA § 36.151 have just started; the reasonableness of EPE's rates will not be determined until after EPE's rate filing package is filed. Nothing in EPE's current Motion changes those facts.

On October 4, 2011, pursuant to authority in PURA § 36.151, the City as a regulatory authority having exclusive original jurisdiction over rates within its city limits, initiated an inquiry into the reasonableness of the rates of El Paso Electric Company. EPE has 120 days

from October 4, 2011, the time limit specified in PURA § 36.153(a), to comply with the statutory requirement to file a rate filing package.<sup>1</sup> This rate filing package has not yet been filed, no hearing has taken place, and the City has not set rates for EPE. Thus no change in EPE's rates has taken place. The status quo remains as per EPE's rates.

## II. ARGUMENT

EPE's argument is mostly a rehash and restatement of the positions set forth in the EPE appeal itself and numerous other pleadings that EPE has filed over the past 30 days. The pleading casts no more light on how to construe the provisions of PURA §§ 32.001(b) or 32.002(b), which proscribe any ability of the Commission to "affect the jurisdiction, power, or duty of a municipality exercising exclusive original jurisdiction in that municipality's regulation and supervision of an electric utility in that municipality."<sup>2</sup> In this instance, EPE is requesting the Commission to not only violate PURA § 32.002(b) by virtue of issuing a "stay," but also to violate PURA § 36.153(a), which provides EPE with a maximum of 120 days to file its rate filing package.

### A. **The Cited Authorities Do Not Support EPE's Request.**

EPE initially cites to various cases in which either the Commission was exercising its original jurisdiction or in which the ratemaking process at the municipality had been completed.<sup>3</sup> The cited cases are all inapplicable to the situation at hand because none of the cases involved any action initiated under PURA §§ 36.151 or 36.153. Additionally, none of the cases addressed time limits imposed by PURA,<sup>4</sup> or the specific powers reserved to cities. Thus, EPE's cited

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<sup>1</sup> PURA § 36.153(a). EPE's rate filing package is not due until February 1, 2012.

<sup>2</sup> PURA § 32.002(b).

<sup>3</sup> See EPE Motion at 2, fn. 5 and at 3, fn. 10 and 13.

<sup>4</sup> Such as the 120 day timeline for filing rate-filing packages proscribed by PURA § 36.153(a).

cases do not speak to the situation present in this proceeding, in which EPE has appealed the City's "action" prematurely, before the City's full exercise of its exclusive original jurisdiction.

The only "new" case cited by EPE is a reference to a case from 1978 that is also distinguishable from the facts of the case at hand.<sup>5</sup> According to the Examiners' Report from that proceeding (which EPE attached to its Motion), the El Paso City Council conducted a review, and thereafter ordered a refund of certain fuel charges. As clearly set forth in the Examiner's Report, the company's appeal was filed *after* the actions at the City were complete. The Examiner specifically recited that the initial action was taken by the City after its review.<sup>6</sup> The City had ordered a refund; it had ordered a change in the rates. Most important for purposes of this case, the appeal was not filed during the process of the review.

In the case at hand, the actions at the City are not yet complete. The City-level review of EPE's rates is still pending. No change in rates has occurred in the instant case. Therefore, Docket No. 2141 only speaks to the Commission's powers *after* the City has completed exercising its original jurisdiction. Docket No. 2141 simply does not support EPE's request.

**B. PURA Prohibits The Relief Sought By EPE In Its Motion.**

Two provisions of PURA prohibit the action requested by EPE in its Motion. First, PURA § 36.153 provides that once a proceeding is commenced under PURA § 36.151, the utility shall file a rate filing package not later than the 120<sup>th</sup> day after the utility is notified that an inquiry will proceed. There is no provision cited by EPE that gives the Commission authority to alter a statutory deadline such as the deadline in PURA § 36.153. This is because such authority does not exist.

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<sup>5</sup> *Petition for Review by EL Paso Electric Company from Refund Motion Passed by the City of El Paso*, Docket No. 2141, Examiner's Order (Jan. 2, 1979).

<sup>6</sup> Docket No. 2141, Examiner's Report at 1 (Jan. 4, 1989).

Second, PURA § 32.002(b) limits the Commission's authority when a municipality is exercising original jurisdiction, and prohibits Commission interference while the case is pending at the city level. The City again stresses that the Commission will eventually have jurisdiction over this matter after the City's action, if there is an appeal. However, it does not yet have jurisdiction while the City is exercising its exclusive original jurisdiction. Put another way, this proceeding is not yet ripe for the Commission's appellate review and EPE's machinations are premature.

**C. Uniform System Rates Are Not Threatened.**

EPE's argument that the City's action threatens uniform system wide rates is simply a distraction. The City understands the general preference for system-wide rates, but system-wide rates are not a requirement of PURA, or the cited case law. EPE cites the *City of Corpus Christi*<sup>7</sup> case in most of its pleadings on this issue. Yet, the Supreme Court did not mandate system-wide rates in that case. At issue in that case was whether the cities could require the utility to provide data separated by municipality; the Supreme Court said "no", as follows:

Reading literally the provisions of Section 23, the municipality must require the utility to furnish certain information, but the burden of making the determination of rate base, expenses, investment, and rate of return is placed upon the municipality. Further, Section 23 requires that the municipality, not the utility, retain the staff necessary to make the determination of reasonable rates. The logical implication of Section 23 is that the burden of separating the required data is upon the municipality, rather than on the utility, and we so hold.<sup>8</sup>

Therefore, EPE's cited authority is not on point to the issue of system-wide rates. However, the issue of system-wide rates need not even be addressed at this time. Since the new rates may not

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<sup>7</sup> *City of Corpus Christi v. Public Util. Comm'n of Texas*, 572 S.W.2d 290, 296 (Tex. 1978).

<sup>8</sup> *City of Corpus Christi*, 572 S.W.2d at 295.

be set until after the City has had a hearing as provided in PURA § 36.151, the issue of system-wide rate uniformity is not germane at this time.

Additionally, EPE's concerns about system-wide rates contradict past assertions made by the Company to its investors and filed with the Securities and Exchange Commission ("SEC"). In EPE's SEC Form 8-K filed October 4, 2011, EPE asserted that:

On the same date the Company files its rate case with the City for rates inside the City limits, the Company plans to file a rate case with the other cities in its Texas service area and with the Public Utility Commission of Texas (PUCT) for rates outside any city limits.

A copy of the 8-K is attached hereto as Exhibit "A." Thus, unless EPE is being untruthful to its investors and the SEC, EPE will file its rate-filing package not only within the City, but also within other cities in its service territory and its environs. By EPE's own admissions, system-wide rates are not and will not be an issue.

**D. EPE Did Not Provide Any Evidence Of Harm Necessary To Support The Extraordinary Relief Requested.**

EPE produced no evidence of harm necessary to support its request for relief under the cited P.U.C. PROC. R. 22.78(c). The rule provides that "the presiding officer may take action on a pleading before the deadline for filing responsive pleadings *when necessary to prevent or mitigate imminent harm or injury to persons or real or personal property.*"<sup>9</sup> EPE has not demonstrated an imminent harm or injury to persons or real or personal property as required by the rule.

EPE's "harm" argument is two-fold. First, EPE alleges that it will suffer harm if a stay is not granted. However, all of the harm alleged in EPE's Motion, and all of the harm alleged in the original affidavit of David Stevens, was predicated on an "expectation" that the City Council

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<sup>9</sup> P.U.C. PROC. R. 22.78(c) [emphasis added].

would lower rates when it set temporary rates. Obviously, that did not happen. None of the information alleged in the Motion is supported by any documents, affidavits, or quantification of the alleged harm. Thus, EPE did not present even a single piece of evidence to demonstrate any harm to justify the emergency action requested in its Motion.

Additionally, EPE cannot request emergency action because it does not have clean hands. EPE's second argument asserts that its requested stay would save litigation costs to ratepayers in the City. The hope is that there would be a mediated and/or settled resolution on the matter of EPE's rates.<sup>10</sup> EPE suggests that a stay could encourage the City to work collaboratively with the Company and the Commission. EPE's position is apparently based on some misconception that the City has stood in the way of collaboration or cooperation. Rather, it is EPE, not the City, that has filed almost daily briefs, motions, and emergency requests with the Commission alleging everything from violations of PURA to totally irrelevant matters such as alleged violations of the Texas Open Meetings Act and the Texas Public Information Act. Contrary to EPE's assertions, it is EPE that needs to be brought to the discussion table, not the City. It is EPE's actions that have driven up litigation costs thus far. Any harm to ratepayers due to increased litigation costs is of EPE's own making.

**E. EPE's Concept Of Enforcing The Docket No. 37690 Order Is A Red Herring.**

The last section of EPE's motion wrongly claims that a stay is supported by the Commission's authority to enforce its own orders. This argument is irrelevant, as the City actions do not violate the Commission's Order in Docket No. 37690. EPE did not identify any provision of the order in Docket No. 37690 that the City has violated. By EPE's logic, neither the Commission nor the City could ever initiate a rate proceeding following a final order setting rates without violating that prior final order.

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<sup>10</sup> EPE Motion at 6.



Once again, EPE's cited authority for its argument is not on point. EPE refers to a case in which the Supreme Court decided that a final order in a certificate of convenience and necessity case was in fact final even though the Commission would continue to monitor the project.<sup>11</sup> Then EPE refers to a decision involving the question of whether the Commission could rely on depreciation study results to support its ordered base rate, even though those depreciation rates were the rates from a study in a prior case.<sup>12</sup> The precedent cited by EPE to demonstrate the Commission's authority to enforce its orders does not relate to whether a show cause inquiry initiated by the regulatory authority would violate a previous order setting rates. EPE's argument should be ignored.

Finally, EPE wrongly asserts that its requested stay would preserve the system-wide rates in Docket No. 37690. As should be obvious to EPE, its rates have not changed. The City's inquiry merely asks EPE to support the reasonableness of the existing rates. At the end of the City review, the City may then choose to set rates. New rates cannot be set until the City has reviewed EPE's rate filing package, which is not due to be filed until February 1, 2012. Thus, EPE's argument about enforcing a prior order is nothing more than another complaint. EPE does not provide a reason or justification for the relief requested in its Motion. For these reasons, the Commission should deny EPE's Motion.

### **III. PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the City respectfully prays that EPE's Motion be in all things denied and for any and all other relief to which it is justly entitled.

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<sup>11</sup> *Tex. New Mexico Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230, 233 (Tex. 1991). TIEC had claimed that the order was not final because there were conditions that had to be fulfilled.

<sup>12</sup> *West Tex. Util. Co. v. Office of Pub. Util. Counsel*, 896 S.W.2d 261, 270 (Tex. App.—Austin 1995, pet. withdrawn).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

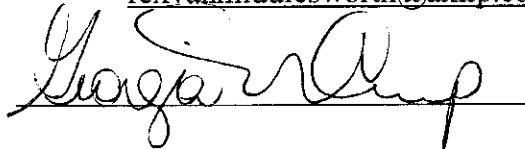
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A handwritten signature in black ink, appearing to read "Rex D. VanMiddlesworth", is written over a horizontal line.

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UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

**Form 8-K**

**CURRENT REPORT**

**Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

**Date of Report (Date of earliest event reported): 10/04/2011**

**El Paso Electric Company**

(Exact name of registrant as specified in its charter)

**Commission File Number: 001-14206**

**Texas**  
(State or other jurisdiction of  
incorporation)

**74-0607870**  
(IRS Employer  
Identification No.)

**Stanton Tower, 100 North Stanton, El Paso, Texas 79901**  
(Address of principal executive offices, including zip code)

**(915) 543-5711**  
(Registrant's telephone number, including area code)

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
  - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
  - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
  - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
-

**Item 8.01. Other Events**

On October 4, 2011, the City Council for the City of El Paso (the "City") adopted a resolution ordering El Paso Electric Company (the "Company") to show cause why its base rates for electric service for customers within the city limits of El Paso should not be lowered. The Company must file a rate case with the City no later than February 1, 2012. The City will have until the 185th day after the date that the Company files its rate case to make a determination regarding the Company's base rates. On the same date the Company files its rate case with the City for rates inside the City limits, the Company plans to file a rate case with the other cities in its Texas service area and with the Public Utility Commission of Texas (PUCT) for rates outside any city limits. The City also scheduled a hearing for October 25, 2011 to consider establishing temporary rates pending the conclusion of the rate case.

As previously disclosed in our 8-K dated September 13, 2011, the Company believes that its current rates, which were approved by the PUCT in July 2010 with the concurrence of the City, are lawful and reasonable.

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

El Paso Electric Company

Date: October 04, 2011

By: /s/ DAVID G. CARPENTER

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David G. Carpenter  
Senior Vice President and Chief Financial Officer  
(Duly Authorized Officer and Principal Financial Officer)