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PUC DOCKET NO. 39868

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

BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

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**CITY OF EL PASO'S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Comes now the City of El Paso ("City") and files this Motion to Dismiss El Paso Electric Company's Petition for Review for lack of jurisdiction, and as grounds for said Motion shows the Commission as follows:

I. INTRODUCTION

On September 13, 2011, at its regular meeting, the City Council of the City of El Paso discussed the reasonableness of the rates charged by El Paso Electric Company ("EPE"), and directed the City Staff to prepare an Order to Show Cause why EPE's rates should not be reduced, and to establish a date at which the City would consider setting temporary rates for EPE. Thereafter, on October 4, 2011, the City Council adopted a resolution directing EPE to provide a filing to the City no later than February 1, 2012, showing cause why its base rates should not be lowered (the "Show Cause Order"). The procedure followed by the City in adopting this resolution was well within the City's authority as a regulatory authority under the provisions of the Texas Utilities Code.¹ Notably, at the meeting on October 4, 2011, the City Council did *not* order EPE to change its rates.

In spite of the fact that the City did not change or otherwise affect EPE's rates, on October 27, 2011, EPE filed a document entitled Petition for Review of the City of El Paso's Rate Resolutions and Request for Expedited Relief ("Petition"). EPE attached to its Petition the

¹ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. (West 2007 & Supp. 2010) (PURA).

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two resolutions adopted by the El Paso City Council on October 4, 2011. Although EPE claims that the actions of the City were somehow improper and complains loudly about an “expectation” that temporary rates will be set at levels lower than current rates, EPE fails to identify any final rate order of the City Council or other action by the City that has actually set rates. Indeed, the purported appeal is not an appeal of any type of final order or rate setting order of the City Council. Any complaint EPE may have in the future about an action by the City affecting its rates is clearly not ripe unless and until the City takes such an action.

EPE has brought its Petition improperly requesting the Commission to act in an advisory capacity. EPE has not exhausted its administrative remedies at the City level, thus the Petition is premature and not ripe, and should be dismissed. The City of El Paso moves under P.U.C. PROC. R. 22.181(a)(1)(A) to dismiss the Petition of El Paso Electric Company for lack of jurisdiction.²

II. NO JURISDICTION

A. EPE Has Failed to Comply with Jurisdictional Procedural Requirements.

The critical portions of PURA appear in Chapter 33. The City has exclusive original jurisdiction over the rates, operations, and services of EPE in areas in the City.³ In the exercise of that original jurisdiction, the City may require the utility to submit information as necessary to make a reasonable determination of rate base, expenses, investment, and rate of return in the City,⁴ to ensure that the utility’s rates are fair, just, and reasonable.⁵

PURA § 33.051 provides that a party to a rate proceeding may appeal the decision of the governing body to the Commission. Only a *decision* can be appealed, not any statements made

² In addition, the Commission should dismiss the Petition because, as is evident on the face of the Petition, EPE failed to comply with the requirements of the Texas Utilities Code for filing and service. Not until Nov. 4 did EPE file any proof of service on the City.

³ PURA § 33.001.

⁴ PURA § 33.021.

⁵ PURA § 33.001.

by individual council members, not any expression of the city's opinion, and not any "expectation" by the utility that a city *may* at some later date undertake a decision affecting the utility. EPE's Petition is rife with speculation as to what the City might do: "the City passed resolutions that . . . *threaten* to establish new, temporary rates"⁶; "[i]t is EPE's *expectation* that the City will order temporary rates to be implemented"⁷; "a City Council member announced her *intent* to reduce EPE's rates"⁸; "it is my *opinion* that the City will order temporary rates to be implemented and that those rates may be lower than current rates"⁹; "a member of the City Council announced her *intent* to reduce EPE's rates...."¹⁰ However, speculation and opinion of what may happen do not provide a basis for an appeal of anything.

PURA § 33.053(a) provides that the appeal is initiated by filing a petition for review and by serving a copy of the petition on each party to the original rate proceeding. PURA § 33.053(b) provides that the appeal must be initiated no later than the 30th day after the final decision of the governing body of the municipality. PURA § 33.054(b) provides that the Commission shall enter a final order establishing the rates that the Commission determines the municipality should have set in the ordinance to which the appeal applies. Finally, the Commission's Procedural Rule § 22.74 provides for service of documents on all parties and requires a Certificate of Service to be a portion of every document.

Nowhere in its Petition does EPE identify the final decision or decision of the City of El Paso from which it alleges it has a right to appeal. Indeed, the only "decisions" to which it refers are the resolutions, which do not either set rates or make any type of final decision. EPE does

⁶ Petition at 2 (emphasis added).

⁷ *Id.* (emphasis added).

⁸ Petition at 11 (emphasis added).

⁹ Affidavit of David W. Stevens, Petition Appendix E at 1 (emphasis added).

¹⁰ *Id.* at 2 (emphasis added).

not and cannot identify the rate or rates which the City set or purported to set, on either a temporary or final basis. Finally, EPE does not identify the “parties” to the proceeding at the City or the parties upon whom copies of its Petition were served, or how it provided copies to the “parties” to the proceeding at the City. EPE did not include a certificate of service.¹¹ Thus, EPE failed to comply with the provisions of the statute and the Commission’s rules.

B. EPE’s “Appeal” is Premature.

The purported appeal presented by EPE’s Petition is not ripe. There is no “final decision” of the governing body of the City setting rates from which EPE could appeal to the Commission. If and when there is a final, appealable decision, it will be clearly reflected in the action taken by the City Council.

Commission precedent reflects the requirement that there be finality to a city action before Commission jurisdiction attaches. As recently as November 9, 2010, the Administrative Law Judges (“ALJs”) in PUC Docket No. 38480 rejected a petition brought by TNMP to accept appeals of actions by certain cities.¹² In denying the company’s request, the ALJs stated: “Specifically, no final decision has been made. The ALJs concur with Cities that TNMP’s motions to consolidate these petitions are premature.”¹³

1. The Show Cause Order does not set rates.

PURA § 36.151 allows a City on its own motion to initiate a proceeding to investigate whether “the existing rates of an electric utility for a service are unreasonable or in violation of law.”¹⁴ If, “after reasonable notice and hearing,” a City finds the rates are unreasonable, the City

¹¹ Not until Nov. 4 did EPE attempt to show how service was performed

¹² *Application of Texas-New Mexico Power Company for Authority to Change Rates*, Docket No. 38480, SOAH Order No. 5, Rulings on Pending Motions (Nov. 9, 2010).

¹³ *Id.* at 4.

¹⁴ PURA § 36.151(a).

must “enter an order establishing the just and reasonable rates to be observed thereafter.”¹⁵ EPE complains that by a resolution dated October 4, 2011, the City initiated a proceeding and required EPE to file a rate-filing package by February 1, 2012. The City has not set any new rates as of the time of the filing of the Petition, and has not yet taken action on the temporary rates.

2. The Show Cause Order is not a decision arising out of a rate proceeding.

The El Paso City Code, the codification of certain ordinances adopted by the City, establishes the procedures to be followed by the City in setting rates over which it has jurisdiction. Sections 15.04.050 and 15.04.060 provide that the City Council acts through “rate orders” adopted by the Council.¹⁶ The resolutions adopted by the City on October 4, 2011, are not “rate orders,” but instead require the utility to present facts in support of its existing rates and set a future public hearing on the utility’s existing rates.

PURA § 33.051 provides that a party to a rate proceeding at the municipality may appeal to this Commission the “governing body’s decision.” PURA § 33.053 makes clear, however, that any such appeal is of a “final decision by the governing body.” The City has made no final decision. In fact, the City has made no decision at all. The City simply required EPE to file a rate-filing package by February 1, 2012, and set a hearing (which has been subsequently postponed) to determine any temporary rates in the interim. Simply put, this Commission has no jurisdiction over this case at the present time because no action has been taken, much less a final decision made.

¹⁵ PURA § 36.151(a)(1).

¹⁶ See Exhibit A attached hereto.

3. The Commission cannot preempt the original jurisdiction of the City.

EPE apparently contends that this Commission has the power to act preemptively and cites to *City of Allen v. Pub. Util. Comm'n of Tex.*¹⁷ as authority for the Commission to do so. EPE's reliance on *City of Allen* is misplaced. First, the utility in *City of Allen* sought review only after the city had enacted the subject ordinances (*i.e.*, made a final decision) and had denied the utility's construction permits for failing to comply with those ordinances.¹⁸ The city's actions were found to be improper because they conflicted with the provisions of PURA, specifically in an area in which the Commission had original jurisdiction.¹⁹

The present case is not at all analogous. In the present case, PURA explicitly allows a municipality to initiate a proceeding to determine if rates are unreasonable, and the City of El Paso has not made any final decision which EPE can appeal. Contrary to the allegations of EPE, if the Commission were to accept jurisdiction of EPE's Petition for review of a case in which there has been no final decision, *that* action would violate PURA. EPE has asked the Commission to accept appellate jurisdiction over a matter in which there has been no decision by the governing body of the municipality, the entity with original jurisdiction over EPE's rates charged within the City. Only after the City has made a decision on EPE's rates after the rate-filing package is filed, can EPE appeal to the Commission, and only then would the Commission have appellate jurisdiction over the City's decision.

4. The Commission cannot exercise appellate jurisdiction when the entity with original jurisdiction has taken no action.

This Commission has previously recognized that where PURA "expressly confers on the Commission a particular power and prescribes the method by which the power is to be exercised, there is an assumption that the Legislature intended the prescribed method to exclude all

¹⁷ *City of Allen v. Pub. Util. Comm'n of Tex.*, 161 S.W.3d 195 (Tex. App. – Austin 2005, no pet.).

¹⁸ *Id.* at 197-98.

¹⁹ *Id.* at 209-10.

others.”²⁰ In Docket No. 34418, the petitioners were seeking a change in a certificate of public convenience and necessity (“CCN”) issued to the utility, but the statute provided that only the utility could initiate a CCN proceeding. The Legislature in enacting PURA intended that municipalities could initiate rate inquiry proceedings and could set temporary rates if they so determined, subject to refund with interest, and the utility could appeal the city’s actions, but only after a final decision was made. There has been no final decision of the municipality in this case, and thus this Commission lacks jurisdiction over EPE’s Petition.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the City of El Paso prays that this Motion be granted and that the Commission dismiss the Petition for Review filed by El Paso Electric Company on October 27, 2011, for lack of jurisdiction.

Respectfully submitted,

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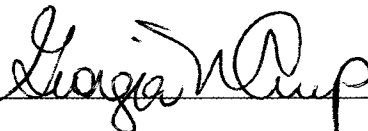
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²⁰ *Joint Petition of 74 Ranch & Harrison Interests, Ltd., Regarding Transmission Line Construction*, Docket No. 34418, Order (dismissal for lack of jurisdiction), CoL No. 2 (Apr. 9, 2008) (footnote omitted).

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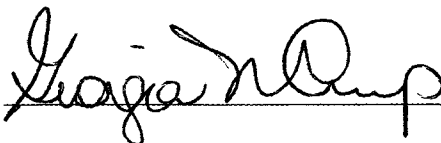
CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served by facsimile on all parties of record in this proceeding on November 7, 2011.

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15.04.050 - Facts and evidence at hearings—Rate order binding with or without.

A rate order of the city council, which without regard to evidence the public utility failed to tender on hearing, is reasonable, shall be conclusively binding on the public utility.

(Prior code § 21-5)

15.04.060 - Facts and evidence at hearings—Rate order effective regardless of petition to tender.

A rate order of city council shall be operative as of the date of its passage, and its effectiveness shall not be suspended by extended or subsequent hearings held on petition of the public utility for the purpose of tendering evidence which it theretofore failed to tender, notwithstanding an opportunity to do so. Such order shall continue operative until it shall have been duly amended pursuant to additional or amended findings of the city council.

(Prior code § 21-6)