

**DOCKET NO. 39868**

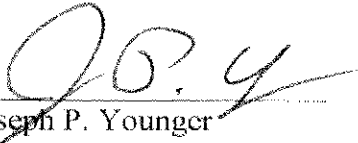
<b>EL PASO ELECTRIC COMPANY'S PETITION FOR REVIEW OF THE CITY OF EL PASO'S RATE RESOLUTIONS</b>	§ § § § §	<b>PUBLIC UTILITY COMMISSION  OF TEXAS</b>
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**COMMISSION STAFF'S RESPONSE TO THE CITY OF EL PASO'S MOTION TO  
DISMISS FOR LACK OF JURISDICTION**

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**COMMISSION STAFF'S RESPONSE TO THE CITY OF EL PASO'S MOTION TO  
DISMISS FOR LACK OF JURISDICTION**

**COMES NOW** the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this response to the City of El Paso's (City) Motion to Dismiss For Lack of Jurisdiction. On November 9, 2011, the presiding officer issued Order No. 2 requiring Staff to file its response to the City's Motion to Dismiss by November 18, 2011.<sup>1</sup> Accordingly, Staff's response is timely filed. Staff believes that the Commission does possess jurisdiction to consider El Paso Electric Company's (EPEC) Petition for Review pursuant to its authority under Public Utility Regulatory Act (PURA)<sup>2</sup> § 32.001(b). Staff recommends, therefore, that the Commission *deny* City's Motion to Dismiss for Lack of Jurisdiction for the reasons set out below.

**I. BACKGROUND**

This case presents several novel questions regarding the Commission's authority to establish and enforce standards governing municipal rate proceedings. The origins of the present controversy began with the July 31, 2010 Commission approved settlement between EPEC, the City, and other parties establishing new electricity rates in EPEC's service territory. Following the settlement, the City apparently began to question whether EPEC's rates remained reasonable within its municipal jurisdiction. The City first took formal action against EPEC at a city council meeting on September 13, 2011. Specifically, the City directed its staff to prepare an order requiring EPEC to show cause as to why its base rates for electric service should not be lowered within the City's jurisdiction. On October 4, 2011, the City then passed a resolution requiring

<sup>1</sup> Order No. 2 Finding Application and Notice Sufficient and Establishing Procedural Schedule at 1 (November 9, 2011).

<sup>2</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-66.016 (Vernon 2007 & Supp. 2011) (PURA).

EPEC to show cause as to why its rates should not be lowered and to file a rate package with the City no later than February 1, 2012 (“Show Cause Resolution”).<sup>3</sup> On the same date, the City passed a second resolution setting a hearing for October 25, 2011 to consider whether requiring EPEC to set temporary rates was appropriate and in the public interest.<sup>4</sup> At the hearing, EPEC made a presentation concerning the reasonableness of its current rates. The City then scheduled an additional hearing on November 15, 2011 to consider the temporary rate issue further.

Two days after the October 25, 2011 temporary rate hearing, EPEC filed a Petition for Review requesting that the Commission either set aside the City’s October 4, 2011 resolutions or, in the alternative, issue a stay of the pending municipal proceedings until the Commission could rule on the merits of whether the City could properly bring a rate case against EPEC. On November 7, 2011, the City filed a Motion to Dismiss for Lack of Jurisdiction.<sup>5</sup> In it, the City maintained that EPEC’s Petition for Review was premature because the City had not yet made any decisions regarding EPEC’s rates.

## **II. PURA’S STATUTORY FRAMEWORK ACCORDS THE COMMISSION THE AUTHORITY TO REVIEW MUNICIPAL ACTIONS LIKE THE CITY’S SHOW CAUSE RESOLUTION**

The threshold issue raised by City’s Motion to Dismiss is whether the Commission possesses the authority under PURA to review the October 4, 2011 Show Cause Resolution. The various actions taken by the City at issue in this appeal clearly are not final decisions, but rather are designed to initiate a full rate proceeding reviewing the reasonableness of EPEC’s rates within the City’s jurisdiction. PURA, however, does not limit the Commission’s appellate authority strictly to the final decisions of municipalities. Rather, the unique relationship established under PURA’s statutory scheme between municipalities exercising exclusive original jurisdiction and the Commission’s authority to set standards and rules for those proceedings to ensure uniform treatment of electric utilities accords the Commission broad powers to review preliminary municipal actions like the City’s October 4, 2011 Show Cause Resolution.

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<sup>3</sup> A copy of the City’s October 4, 2011 resolution is attached to EPEC’s Petition for Review as Appendix “A.” El Paso Electric Company’s Petition for Review of the City of El Paso’s Rate Resolutions and Request for Expedited Relief at 16 (October 27, 2011) (“Petition for Review”).

<sup>4</sup> A copy of the City’s October 4, 2011 resolution is attached to EPEC’s Petition for Review as Appendix “B.” *Id.* at 18 (October 27, 2011).

<sup>5</sup> City of El Paso’s Motion to Dismiss for Lack of Jurisdiction (November 7, 2011) (“Motion to Dismiss”).

PURA establishes a two-tiered system of regulation of electric utilities operating within municipalities such as the City. As an initial matter, PURA explicitly recognizes the power of local municipal authorities to regulate utility service within their municipal limits. PURA § 33.001(a) provides that the “governing body of a municipality has exclusive original jurisdiction over the rates, operations, and services of an electric utility in areas in the municipality, subject to the limitations imposed by this title.”<sup>6</sup> At the same time, in order to satisfy PURA’s statutory goal of creating a “comprehensive and adequate regulatory system,” the legislature conferred broad powers on the Commission to ensure uniform methods of utility regulation by various municipalities throughout the state.<sup>7</sup> First, PURA § 33.004(b) requires municipalities to exercise their original jurisdiction “under the same standards and rules as the commission or under other consistent standards and rules.”<sup>8</sup> PURA § 32.001(b) further provides the Commission with “exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising original jurisdiction under this subtitle.”<sup>9</sup> When conducting its review of municipal actions in the context of rate proceedings, the Commission’s review is entirely *de novo* as to both questions of law and fact.<sup>10</sup> Collectively, this statutory regime contemplates an active role for the Commission in promoting the “goal of regulatory uniformity” for electric utilities throughout Texas.<sup>11</sup>

Citing PURA § 33.051, the City maintains that the Commission lacks jurisdiction to review EPEC’s petition because the City has not made a “decision” concerning EPEC’s rates.<sup>12</sup> In effect, the City argues that there must be some “final decision” setting EPEC’s rates before Commission jurisdiction attaches.<sup>13</sup> The City is correct that PURA § 33.051 establishes the Commission’s power to review a final municipal rate decision. Critically, however, EPEC did not invoke the Commission’s jurisdiction under the appellate provisions of PURA § 33.051, but

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<sup>6</sup> PURA § 33.001(a).

<sup>7</sup> PURA § 11.002(a); *City of Allen v. Public Utility Commission of Texas*, 161 S.W.3d 195, 208 (Tex. App.—Austin 2005, no pct.).

<sup>8</sup> PURA § 33.004(b).

<sup>9</sup> PURA § 32.001(b).

<sup>10</sup> PURA § 33.054(a) & (b).

<sup>11</sup> *City of Allen* at 208.

<sup>12</sup> City of El Paso’s Motion to Dismiss for Lack of Jurisdiction at 2.

<sup>13</sup> *Id.* at 4.

rather under the Commission's general authority to review a municipal "order or ordinance" pursuant to PURA § 32.001(b). This provision accords the Commission the additional authority to review municipal cases prior to their final resolution to ensure that such proceedings are conducted in a manner at least consistent with Commission standards and rules as required by PURA § 33.004(b). As a result, the Commission does possess jurisdiction to review the City's October 4, 2011 Show Cause Resolution to ascertain whether it is consistent with Commission standards and rules for initiating a rate proceeding.

The scope of the Commission's appellate jurisdiction under PURA § 32.001(b) hinges on PURA's broad definition of an "order." PURA defines an "order" as "all or *a part of* a final disposition by a regulatory authority in a matter other than rulemaking, without regard to whether the disposition is affirmative or negative or injunctive or declaratory."<sup>14</sup> The Third Court of Appeals has interpreted PURA's definition of an "order" to include a number of preliminary actions by regulatory authorities. In its decision in *Texas Association of Long Distance Telephone Companies (TEXALTEL) v. Public Utility Commission of Texas*, TEXALTEL asked the Third Court of Appeals to read the term "order" in PURA § 11.003(13) to mean a final and appealable order so as to prohibit the Commission from setting the effective date of a revised rate to a date before the order in the proceeding became administratively final.<sup>15</sup> The Court of Appeals concluded this definition of an "order" was too narrow. Focusing on PURA § 11.003(13)'s language defining an "order" as "all or a part of the final disposition," the court concluded that "[t]his definition does not even require that an order resolve all issues (i.e., be a final order), much less that it be an *appealable* order. The PURA definition of order would apparently include even an interlocutory order (e.g., a temporary rate order)."<sup>16</sup> The Court of Appeals recognized that PURA's statutory definition of an "order" included a broad range of decisions, including even interlocutory orders that constituted a part of the final disposition of a proceeding. Contrary to the City's assertions in its Motion to Dismiss, parties do not have to wait for a final decision in order to invoke the Commission's jurisdiction to review an "order" under PURA § 32.001(b).

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<sup>14</sup> PURA § 11.002(13) (emphasis added).

<sup>15</sup> *Texas Association of Long Distance Telephone Companies (TEXALTEL) v. Public Utility Commission of Texas*, 798 S.W.2d 875 (Tex. App. -- Austin 1990, writ denied).

<sup>16</sup> *Id.* at 885.

Recognizing the Commission's broad authority to review municipal orders prior to a final municipal decision also makes sense within PURA's two-tiered regulatory system.<sup>17</sup> In particular, while the legislature preserved the original jurisdiction of municipalities, it specifically tasked the Commission with developing uniform standards under PURA's comprehensive regulatory scheme in order to avoid piecemeal oversight of electric utilities operating throughout the state.<sup>18</sup> To this end, PURA § 33.004(b) specifically mandates that municipalities follow or at least mirror Commission standards and rules in conducting their regulatory activities. In short, the Commission operates in a "statutory context" in which it has the authority to determine the standards and rules by which municipalities exercise their exclusive original jurisdiction.<sup>19</sup> It stands to reason that the Commission necessarily has the same broad powers to ensure compliance with those standards and rules.<sup>20</sup>

PURA in fact provides two mechanisms for the Commission to exercise its statutory authority to promote a uniform and comprehensive system of regulation by overseeing municipal proceedings. First, PURA § 33.054(a) grants the Commission the authority to review municipal rate determinations entirely *de novo*.<sup>21</sup> PURA § 33.054(b) further mandates that the Commission "enter final orders establishing rates the municipality should have set in the ordinance to which the appeal applies."<sup>22</sup> In short, the Commission is charged with comprehensively reviewing any municipal rate decision to ensure it meets PURA's statutory standards for rate proceedings. As the City points out in its Motion to Dismiss, these procedures contemplate the appeal of a final decision in a rate proceeding. Once on appeal, however, the Commission is not bound by the underlying decision in any way. Rather, the Commission is obligated to establish rates the

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<sup>17</sup> See *Texas-New Mexico Power Company v. Texas Industrial Energy Consumers*, 806 S.W.2d 230, 232 (Tex. 1991) (stating that courts should consider the "statutory and constitutional context in which the agency operates" in considering questions of whether an administrative order is final and appealable).

<sup>18</sup> *City of Allen*, at 208 ("PURA altered that piecemeal oversight by providing a comprehensive regulatory system for utilities . . . Empowering the Commission with jurisdiction to review certain municipal orders furthers the goal of regulatory uniformity.")

<sup>19</sup> *Texas-New Mexico Power Company* at 232.

<sup>20</sup> See, e.g., *Texas Workers' Compensation Commission v. Patient Advocates of Texas*, 136 S.W. 3d 643, 652 (Tex. 2004) (stating that an administrative agency has only such powers as granted to it by statute, along with those necessarily implied "to carry out the express functions or duties given or imposed by statute"); *Public Utility Commission v. Southwestern Bell Telephone Company*, 960 S.W. 2d 116, 119 (Tex. App.—Austin 1997, no pct.).

<sup>21</sup> PURA § 33.054(a).

<sup>22</sup> PURA § 33.054(b).

municipality should have set under PURA and the Commission's rules. Thus, while the Commission may be exercising its appellate authority, PURA grants the Commission substantially greater powers than would be the norm for a typical appellate court reviewing the actions of regulatory authorities.<sup>23</sup>

Consistent with these broad appellate powers following a final decision, PURA § 32.001(b) equally provides the Commission with the authority to ensure that municipal procedures are consistent with its "standards and rules" prior to a final order if it deems such an action necessary to promote the goals of regulatory uniformity. Again, the difference in the language in PURA § 33.051 and § 32.001(b) is telling. PURA § 33.051 explicitly authorizes an appeal of a municipal *decision* to the Commission. In contrast, PURA § 32.001(b) contemplates the appeal of an "order," which is defined as "all or a part of a final disposition."<sup>24</sup> When read in light of the Commission's exceptional powers to establish the standards and rules for municipal rate proceedings, not to mention the Court of Appeals' broad interpretation of PURA's definition of an "order" in the *TEXALTEL* case, it is clear that the Commission possesses the jurisdictional authority necessary to ensure that municipal proceedings satisfy its requirements without having to wait for a final decision to correct the error.<sup>25</sup>

### **III. THE COMMISSION HAS JURISDICTION TO REVIEW CITY'S OCTOBER 4, 2011 SHOW CAUSE RESOLUTION**

The present case presents a good example of a situation in which the Commission's authority to review municipal proceedings prior to their final resolution is vital to ensuring regulatory uniformity and certainty within PURA's two-tiered regulatory system. The crux of EPEC's argument is that the City has failed to follow Commission standards for initiating a rate proceeding. As EPEC points out in its Petition for Review, it faces not only substantial expenses in preparing a rate filing package, but also significant threats from the regulatory uncertainty resulting from a new rate proceeding within the City's jurisdiction. It therefore seeks relief from the Commission before it faces a full rate case under what it believes to be an erroneous standard.

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<sup>23</sup> See, e.g., *Public Utility Commission of Texas v. AT&T Communications of the Southwest*, 777 S.W.2d 363, 365 (Tex. 1977) (holding that a "reviewing appellate court is not to make independent findings of fact" in the appeal of an agency decision).

<sup>24</sup> PURA §§ 32.001(b) & 11.003(13).

<sup>25</sup> E.g., *Texas Workers' Compensation Commission* at 652.



The Commission may ultimately conclude that no such standard exists and that the City is free to require EPEC to file a rate filing package as a valid exercise of its original jurisdiction. However, assume for the moment that EPEC is correct that such a standard does exist or, alternatively, that the Commission chooses to establish a definitive rule for initiating a rate proceeding at some point in the future. The City's jurisdictional argument then implies that a municipality could simply ignore that standard and force an electric utility to litigate a full rate case before the Commission could ever review the municipality's action. Such a narrow reading of Commission jurisdiction runs counter to the exceptional powers PURA accords the Commission over municipal proceedings.<sup>26</sup> Instead, the logical interpretation of PURA § 32.001(b)'s language, particularly in light of PURA's mandate that municipalities act in a manner consistent with Commission standards and rules in exercising their original jurisdiction, is that the Commission possesses the necessary authority to address threshold questions of whether its standards, if any, for initiating a rate proceeding have been met *before* the parties fully litigate a rate case at the municipal level.

While the Commission's jurisdictional authority under PURA's statutory framework is significantly broader than a district court reviewing agency decisions, the "finality" standard established by the Texas Supreme Court provides some useful guidelines for evaluating whether the City's Show Cause Resolution triggers the Commission's jurisdiction. In determining whether an agency order is final and therefore subject to judicial review, Texas courts have adopted a "pragmatic and flexible approach."<sup>27</sup> Courts should consider the "statutory and constitutional context in which the agency operates" in assessing their own jurisdiction to review administrative actions.<sup>28</sup> Within this framework, administrative orders are "generally final and appealable if *they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.*"<sup>29</sup>

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<sup>26</sup> It also is arguably narrower than even the extraordinary relief accorded to parties through a writ of mandamus in the Texas courts. Under this standard, Texas appellate courts possess the authority to review clear abuses of discretion by lower courts in situations where a regular appellate remedy would be inadequate. *See, e.g., In re Prudential Insurance Company of America*, 148 S.W. 3d 124 (Tex. 2004) (orig. proceeding).

<sup>27</sup> *Texas-New Mexico Power Company*, at 232; *see also Southwestern Electric Power Company v. Public Utility Commission of Texas*, No. D-1-GN-008-003871 at 5-11 (November 4, 2011) (concluding that cost caps imposed by the Commission were "final" decisions and therefore ripe for judicial review).

<sup>28</sup> *Texas-New Mexico Power Company* at 232.

<sup>29</sup> *Id.* (emphasis added).

Applying the reasoning underpinning this admittedly more restrictive standard again makes clear that the Commission possesses jurisdiction over the City's October 4, 2011 Show Cause Resolution. As an initial matter, the City has imposed a clear obligation on EPEC to tender a rate filing package by February 1, 2012. EPEC has explicitly invoked the Commission's jurisdiction to review whether the City's actions have violated any Commission standards for initiating these types of rate proceedings. The harm, if any, to EPEC will flow precisely from unnecessarily having to prepare and file a rate filing package when the Commission's supposed standards (again, if the Commission concludes that there are any) would have shielded them from such requirements. Moreover, we have already seen that the statutory scheme in PURA explicitly accords the Commission broad authority to establish and ensure compliance with its own procedures in municipal proceedings. Unlike a district court, it need not wait for a final and appealable order. This is particularly so where the putative failure to follow Commission standards threatens to impose substantial harm on one of the parties before it could be remedied through the appeal of a final decision under PURA § 33.051. Instead, viewing these jurisdictional questions through the "pragmatic and flexible" lens called for by the Texas Supreme Court, it is apparent that the Commission must have the authority to review the City's October 4, 2011 Show Cause Resolution under PURA § 32.001(b).

This is not to say that the Commission need or should review every action of a municipality exercising its original jurisdiction. To the contrary, the Commission can always dismiss any appeal on policy grounds without sacrificing its authority to ensure that municipalities do not disregard Commission standards and rules.<sup>30</sup> However, PURA and the decisions interpreting its language accord the Commission the discretion to intervene in cases such as EPEC's when it appears necessary to protect parties from the erroneous application, if any, of its rules and standards. The Commission should preserve this statutorily-authorized

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<sup>30</sup> This is precisely what the Commission appears to have done in the dockets cited by the City to suggest that the Commission lacks the jurisdictional authority to hear this appeal. For example, in Docket No. 38480, the Administrative Law Judge (ALJ) concluded that a request by Texas-New Mexico Power Company to appeal the actions of several municipalities regarding rate case expenses was premature. In doing so, however, the ALJ did not expressly conclude that the Commission lacked jurisdiction. Rather, the ALJ's decision can be read simply to conclude that there was no compelling need to consider the underlying cases until their final resolution. *Application of Texas-New Mexico Power Company for Authority to Change Rates*, Docket No. 38480, SOAH Order No. 5, Rulings on Pending Motions at 4 (November 9, 2010). The Commission retains the authority to select those cases in which an immediate ruling on threshold rules and standards is critical while retaining the discretion to require parties to fully litigate other matters fully at the municipal level where circumstances so dictate.

power to promote the uniform regulation of electric utilities by denying the City's Motion to Dismiss.

**IV. CONCLUSION AND PRAYER FOR RELIEF**

EPEC filed its Petition for Review pursuant to PURA § 32.001(b). This provision grants the Commission broad statutory authority to review actions by municipalities exercising their original jurisdiction to ensure they are consistent with Commission rules and standards. Based on this statutory authority, as well as the potential for harm to EPEC flowing from the City's action before any final appeal may be taken, the Commission possesses the jurisdictional authority to rule on the merits of EPEC's petition. The City's Motion to Dismiss should be denied.

Respectfully Submitted,

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**DOCKET NO. 39868****CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on this the 18<sup>th</sup> day of November in accordance with P.U.C. Procedural Rule 22.74.

  
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Joseph P. Younger