



RAILROAD COMMISSION OF TEXAS

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Chairman Barry T. Smitherman
Commissioner David Porter
Commissioner Christi Craddick

FROM: Cristina Self, Attorney– General Counsel Section
Office of General Counsel *ms*

THROUGH: Lindil C. Fowler, General Counsel *LF*

DATE: July 1, 2014

SUBJECT: Proposed New 16 TAC §1.86, relating to Alignment of Municipal Intervenor for Purposes of Discovery; New 16 TAC §1.87, relating to Limitations on Discovery Requests; Amendment of 16 TAC §7.5530, relating to Allowable Rate Case Expenses; Gas Utilities Docket No. 10362.

July 8, 2014		
Approved	Denied	Abstain
A large, handwritten signature in black ink is written across the table grid. Below the signature is a circular stamp with the text "CG" and "JUL 11 2014".		

Attached is Staff's recommendation to publish new 16 Tex. Admin. Code §1.86, relating to Alignment of Municipal Intervenor for Purposes of Discovery; new 16 Tex. Admin. Code §1.87, relating to Limitations on Discovery Requests; and certain amendments to 16 Tex. Admin. Code §7.5530, relating to Allowable Rate Case Expenses.

Staff requests the Commission's approval to publish the proposed new rules and amendments in the *Texas Register* for a 30-day comment period. If approved at conference on July 8th, the proposal should appear in the July 25th, 2014, issue of the *Texas Register*. This proposal and an online comment form would also be made available on the Commission's website the day after conference, giving interested persons more than two additional weeks to review and submit comments to the Commission.

cc: Jason Boatright, Director– General Counsel Section
Bill Geise, Director – Gas Services Division
Gene Montes, Interim Director—Hearings Division
Milton Rister, Executive Director
Wei Wang, Chief Financial Officer

1 The Railroad Commission of Texas (Commission) proposes new §1.86, relating to Alignment of
2 Municipal Intervenors for Purposes of Discovery, and §1.87, relating to Limitations on Discovery
3 Requests. The Commission concurrently proposes amendments to §7.5530 of this title, relating to
4 Allowable Rate Case Expenses, in a separate rulemaking, in conjunction with these proposed new rules.

5 State statutes allow participants in complex utility rate cases to recover rate-case expenses from
6 customers. These rules are intended to reduce rate-case expenses and promote the efficient resolution of
7 cases. Alignment of parties reduces rate-case expenses by reducing the duplication of services. Since
8 1999, litigants in Texas courts have complied with procedures that impose discovery control plans which
9 effectively control costs in complex cases. These rules would be limited to rate-setting proceedings and
10 are designed to promote the efficient resolution of cases, thereby reducing rate-case expenses. Section
11 1.121 of this title, relating to Presiding Officer, grants a presiding officer broad discretion in regulating
12 the course and conduct of a proceeding. Proposed new §§1.86 and 1.87 specifically delineate for parties
13 in a proceeding and a presiding officer what terms and considerations apply to alignment of municipal
14 parties and limitations on discovery. The proposed new rules promote efficient use of party and
15 Commission resources. Rate case proceedings, in particular, can be costly litigation exercises. While
16 parties have the right to contest a utility's request for rate relief and other forms of relief, there are
17 efficiencies that can be gained through alignment of parties and reasonable discovery limitations that will
18 result in reduced rate case expenses, thereby reducing the costs that are passed on to ratepayers. New
19 §1.86 recognizes that parties that participate in a utility ratemaking case are frequently aligned in their
20 attempts to reduce the utility's requested rate increase, and preserves a municipal party's right to
21 propound discovery requests while recognizing that it is more efficient for the utility to respond to a
22 single opposing position from potential municipal intervenors rather than respond to multiple versions of
23 similar discovery requests propounded by parties with the same goal. Thus, the goal of reducing the

1 costs ultimately passed on to ratepayers can be realized by aligning parties with similar interests.

2 In new §1.86(a), the Commission proposes wording to include a presumption that municipal
3 parties share a common interest such that alignment of municipal parties as a single party is appropriate.
4 Proposed subsection (a) directs the presiding officer to order alignment of municipal parties at the
5 earliest reasonable opportunity to allow municipal parties to coordinate their efforts in the most efficient
6 way possible.

7 The Commission proposes new §1.86(b) to require a municipal party to file a motion to realign,
8 in whole or in part, to overcome the presumption of alignment. In paragraphs (1) - (7), the presiding
9 officer is required to consider several factors to determine whether the motion to realign, in whole or in
10 part, is warranted including: (1) whether the municipal parties are taking opposing positions regarding
11 the utility's request for relief; (2) whether the municipal parties have sufficiently different positions on
12 one or more issues to justify realignment on such issues; (3) whether granting the motion will create
13 unnecessary inefficiencies or duplication of effort; (4) whether granting the motion will result in undue
14 costs to the parties; (5) the effect of granting the motion on the parties and the public interest; (6)
15 whether granting the motion will serve the interest of justice; and (7) any other relevant factors as
16 determined by the presiding officer.

17 Proposed new §1.86(c) states that this section applies to proceedings brought pursuant to Texas
18 Utilities Code, §103.055 and §104.102.

19 Proposed new §1.87(a) grants the presiding officer the discretion, upon request by a party, to
20 order discovery to be limited in the interests of efficiency and justice.

21 Proposed new §1.87(b) clarifies that each request or subpart in a Request for Information (RFI) is
22 considered a separate RFI and indicates that a reasonable limitation on discovery is no more than 600
23 total RFIs with no more than 75 RFIs propounded by a single party in a single calendar week.

1 Commission staff and presiding officers are not subject to these discovery limitations when Commission
2 staff or the presiding officers issue the RFIs. These figures are consistent with the discovery control plan
3 adopted by the presiding officers in rate-setting procedures conducted at the Commission over the last ten
4 years. New §1.87 codifies recent rulings recognizing that reasonable limitations on discovery are
5 appropriate. For example, discovery limitations have been granted in recent dockets including GUD Nos.
6 9902, 10006, 10007, 10038, 10097, and 10106. Moreover, limitations on discovery are common practice
7 in civil litigation in Texas as governed by the Texas Rules of Civil Procedure 190. The goal of reducing
8 the costs ultimately passed on to ratepayers can be realized by implementing reasonable limitations on
9 discovery at the request of a party.

10 Proposed new §1.87(c) directs that the RFIs propounded during the municipal-level proceeding,
11 if the utility first filed its request for relief at the municipal level and the Commission is exercising its
12 appellate authority, shall count towards the total number of RFIs a municipality may propound on the
13 utility during the Commission proceeding unless the utility updated its test year when filing its appeal.

14 Proposed new §1.87(d) states that RFIs that a party is not required to answer due to a sustained
15 objection or withdrawal do not count towards the permissible total number of the propounding party's
16 RFI limit. The subsection also states that if the presiding officer determines that a party is intentionally
17 propounding objectionable RFIs, the request or subpart will be included in the calculation of that
18 propounding party's RFI limit even if the responding party is not required to provide an answer.

19 In accordance with the Texas Rules of Civil Procedure 196 and 198, proposed new §1.87(e)
20 clarifies that discovery limitations would not apply to Requests for Production and Inspection, or
21 Requests for Admission.

22 Proposed new §1.87(f) requires the party propounding discovery to separately characterize its
23 discovery as an RFI, a Request for Production and Inspection, or a Request for Admission.

1 Gene Montes, Interim Director, Hearings Division, has determined that for each year of the first
2 five years that the proposed new rules are in effect, enforcing or administering the proposed new rules
3 will not result in additional estimated costs to the state or to local governments, may result in a reduction
4 in costs for local governments that participate in proceedings before the Commission by reducing the
5 costs of participating in Commission proceedings, and will not result in any estimated losses or increases
6 in revenue to the state or to local governments.

7 Mr. Montes has also determined that for each year of the first five years that the proposed rules
8 are in effect, the public benefits expected as a result of adoption of the proposed rules include a reduction
9 in the amount of reasonable rate case expenses included in customer rates. These proposed rules codify
10 current Commission practice and provide regulatory certainty for parties in rate proceedings. There are
11 no foreseeable economic costs to be incurred by parties or persons required to comply with these rules.

12 Mr. Montes has also determined that for each year of the first five years the proposed
13 amendments are in effect, there should be no adverse effect on a local economy and therefore no local
14 employment impact statement is required under Texas Government Code, §2001.022.

15 Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic
16 Effect, requires that as a part of the rulemaking process, a state agency prepare an Economic Impact
17 Statement that assesses the potential impact of a proposed rule on small businesses and micro-businesses
18 and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the
19 rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses.
20 Mr. Montes has determined that the proposed amendments will not have an adverse economic effect on
21 small businesses or micro-businesses because it adds no new requirements on small businesses or
22 micro-businesses. The proposed rules promote the efficient resolution of rate proceedings.

23 Mr. Montes has determined that the amendments do not meet the statutory definition of a major

1 environmental rule as set forth in Texas Government Code, §2001.0225; therefore, a regulatory analysis
2 conducted pursuant to that section is not required.

3
4 Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel,
5 Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at
6 <http://www.rrc.state.tx.us/legal/rules/comment-form-for-proposed-rulemakings>; or by electronic mail to
7 rulescoordinator@rrc.state.tx.us. Comments should refer to Gas Utilities Docket No. 10362 and will be
8 accepted until 12:00 p.m. (noon) on Monday, August 25, 2014, which is 31 days after publication in the
9 *Texas Register*. The Commission finds that this comment period is reasonable because the proposal as
10 well as an online comment form will be available on the Commission's website at least two weeks prior
11 to *Texas Register* publication of the proposal, giving interested persons additional time to review the
12 proposal and submit comments. The Commission encourages all interested persons to submit comments
13 no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline
14 will be considered. For further information, call Cristina Self at (512) 463-2299. The status of
15 Commission rulemakings in progress is available at <http://www.rrc.state.tx.us/legal/rules/proposed-rules>.

16 The Commission proposes the new sections under Texas Utilities Code, Titles 3 and 4, which
17 authorize the Commission to regulate gas utilities, to protect the public interest inherent in the rates and
18 services of gas utilities, and to assure rates, operations, and services that are just and reasonable to the
19 consumers and to the utilities as required by Texas Utilities Code, §104.001 and §104.051. The
20 Commission's authority to promulgate these rules relates to the powers it is granted in Texas Utilities
21 Code, §§103.022, which requires a gas utility in a ratemaking proceeding to reimburse the governing
22 body of a municipality for the reasonable cost of certain services to the extent determined reasonable by
23 the Commission; 104.051, which authorizes the Commission to establish a utility's overall revenues at an

1 amount that will permit the utility a reasonable opportunity to earn a reasonable return; and Texas
2 Government Code §2001.004, which requires a state agency to adopt rules of practice stating the nature
3 and requirements of all available formal and informal procedures.

4 Texas Utilities Code, §§103.022, 104.051; and Texas Government Code §2001.004 are affected
5 by the proposed new sections.

6 Cross-reference to statute: Texas Utilities Code, §§103.022, 104.051; and Texas Government
7 Code §2001.004.

8
9 §1.86. Alignment of Municipal Intervenors for Purposes of Discovery.

10 (a) Municipal parties, whether participating as a single municipality or a coalition of
11 municipalities, are presumed to share a common interest in a proceeding such that alignment of
12 municipal parties as a single party for purposes of discovery is appropriate. The presiding officer shall
13 order alignment of municipal intervenors at the earliest reasonable opportunity so as to avoid
14 unnecessary duplication of effort and to allow aligned parties an adequate opportunity to coordinate
15 discovery efforts in an efficient manner.

16 (b) To overcome the presumption of alignment, a municipality or municipal coalition must file a
17 motion to realign in whole or in part. In ruling on such a motion, the presiding officer shall consider
18 whether good cause exists to grant the motion to realign in whole or in part including consideration of the
19 following:

20 (1) whether the municipal parties are taking opposing positions regarding the utility's
21 request for relief;

22 (2) whether the municipal parties have sufficiently different positions on one or more
23 issues to justify realignment on such issues;

1 (3) whether granting the motion will create unnecessary inefficiencies or duplication of
2 effort;

3 (4) whether granting the motion will result in undue costs to the parties;

4 (5) the effect of granting the motion on the parties and the public interest;

5 (6) whether granting the motion will serve the interest of justice; and

6 (7) any other relevant factors as determined by the presiding officer.

7 (c) This section applies to proceedings brought pursuant to Texas Utilities Code, §103.055 and
8 §104.102.

9
10 §1.87. Limitations on Discovery Requests.

11 (a) Upon request by a party, the presiding officer may limit discovery, by order, in the interest of
12 efficiency and justice.

13 (b) For purposes of calculating the number of requests for information (RFIs), each request or
14 subpart shall be considered a separate RFI. A reasonable limitation on RFIs propounded to a party is no
15 more than 600 total RFIs, with no more than 75 RFIs propounded by a single party in one calendar week.
16 Commission staff and presiding officers are not subject to these discovery limitations when Commission
17 staff or the presiding officers issue the RFIs.

18 (c) With regard to discovery propounded by a municipality or municipal coalition, to the extent
19 that the utility first filed its request for relief at the municipal level and the Commission is now
20 considering the utility's request on appeal from the municipal forum, the number of RFIs (inclusive of
21 sub-parts) that the municipality propounded at the municipal level shall count towards the total number
22 of permissible RFIs a municipality may serve on the utility during the Commission proceeding on appeal,
23 unless the utility updated its test year when filing its appeal.

1 (d) If a party is not required to answer a question due to a sustained objection or withdrawal, that
2 question may not be included in the calculation of the propounding party's RFI limit. However, if the
3 presiding officer determines that a party is intentionally propounding frivolous, irrelevant, or otherwise
4 objectionable requests, the question shall be included in the calculation of that propounding party's RFI
5 limit.

6 (e) As set out in the Texas Rules of Civil Procedure 196 and 198, there shall be no limitation
7 with regard to requests for production and inspection, or requests for admission.

8 (f) The party propounding discovery shall separately characterize its discovery as an RFI, a
9 Request for Production and Inspection, or a Request for Admission.

10 (g) This section applies to proceedings brought pursuant to Texas Utilities Code, §103.055 and
11 §104.102.

12 This agency hereby certifies that the proposal has been reviewed by legal counsel and found to
13 be within the agency's authority to adopt.

14 Issued in Austin, Texas on _____, 2014.

15 Filed with the Office of the Secretary of State on _____, 2014.

Cristina Martinez Self
Rules Attorney, Office of General Counsel
Railroad Commission of Texas

1 The Railroad Commission of Texas (Commission) proposes amendments to §7.5530, relating to
2 Allowable Rate Case Expenses. Texas Utilities Code §§103.022(b) and 104.001 allow participants in
3 utility rate cases to recover reasonable rate case expenses. These amendments are intended to ensure that
4 rate case expenses are reasonable and to minimize the impact of rate case expenses on end-use
5 customers. The amendments recognize the basic reimbursement principle included in §103.022(b), which
6 requires a gas utility to reimburse a municipality for the reasonable costs of participating in a ratemaking
7 proceeding. The proposed amendments are also intended to encourage municipal oversight of rate case
8 expenses incurred on behalf of municipalities and to allocate rate case expenses to the party or parties
9 that caused such expenses during the appeal of a municipal statement of intent. The amendments
10 memorialize recent Commission precedent by categorizing rate case expenses of the utility as required
11 regulatory expenses of the utility, litigation expenses of the utility, and estimated expenses of the utility.
12 The Commission concurrently proposes new §§1.86 and 1.87 of this title, relating to Alignment of
13 Municipal Intervenors for Purposes of Discovery, and Limitations on Discovery Requests, in a separate
14 rulemaking, in conjunction with these proposed amendments to §7.5530.

15 The Commission proposes new §7.5530(c) to state that a gas utility shall not be required to
16 reimburse a municipality for the reasonable costs of a person engaged to participate in a ratemaking
17 proceeding under Texas Utilities Code, §103.022(a), unless the municipality has actually paid such fees
18 and expenses or, by ordinance, the municipality expressly assumes the obligation to pay the fees and
19 expenses of persons engaged under Texas Utilities Code, §103.022(a), and the municipality declares that
20 such obligation is not in any way contingent upon the municipality's receipt of reimbursement under
21 Texas Utilities Code, §103.022(b). Requiring municipalities to actually pay or assume the obligation to
22 pay the fees and expenses of persons engaged under Texas Utilities Code, §103.022(a), will encourage
23 municipal oversight of the charges incurred during an appeal of a municipal proceeding.

1 The Commission proposes new subsection (d) to require, absent a showing of good cause, that
2 expenses the gas utility reimburses to a municipality be recovered through rates effective only within that
3 municipality, or if the gas utility has joined a coalition of municipalities, rate case expenses reimbursed
4 to the municipalities within the coalition would be recovered through rates effective only within the
5 municipalities belonging to the coalition. This assures that customers who live in a city that participates
6 in a rate proceeding would be required to pay their own city's expenses rather than allocating such costs
7 to all customers in the service area, some of whom are not involved in the litigation.

8 The Commission proposes new subsection (e) to classify utility rate case expenses as either
9 "required regulatory expenses," "litigation expenses," or "estimated expenses," and to provide for
10 specific recovery of those expenses based on principles of cost causation. Through this method of
11 allocation, rate case fees and expenses shall be attributed to affected parties according to which party or
12 parties cause the rate case fees and expenses to occur.

13 The Commission proposes new subsection (f) to allocate the categories of rate case expenses
14 listed in proposed subsection (e). This allocation methodology results in rate case expenses being
15 assigned to those parties who contribute to the rate case expenses being incurred.

16 Bill Geise, Director, Gas Services Division, has determined that for each year of the first five
17 years that the proposed amendments are in effect, enforcing or administering the proposed amendments
18 will not have foreseeable implications relating to cost or revenues of the state or local governments.

19 Mr. Geise has also determined that for each year of the first five years that the proposed
20 amendments are in effect, the public benefits anticipated as a result of adoption of the proposed rules
21 include an allocation of recovery of rate case expenses that is guided by principles of cost causation.
22 There are no foreseeable economic costs to be incurred by the parties and/or persons required to comply
23 with these amendments. Affected municipalities will continue to be reimbursed by gas utilities for any

1 rate case expenses the Commission determines to be reasonable, provided that the municipalities have
2 paid rate case fees and expenses or, by ordinance, expressly assumed the obligation to pay such fees and
3 expenses.

4 Mr. Geise has also determined that for each year of the first five years the proposed amendments
5 are in effect, there should be no adverse effect on a local economy, and therefore no local employment
6 impact statement is required under Texas Government Code §2001.022.

7 Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic
8 Effect, requires that as a part of the rulemaking process, a state agency prepare an Economic Impact
9 Statement that assesses the potential impact of a proposed rule on small businesses and micro-businesses
10 and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the
11 rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses.

12 Mr. Geise has determined that the proposed amendments will not have an adverse economic effect on
13 small businesses or micro-businesses because it adds no new requirements on small businesses or micro-
14 businesses.

15 Mr. Geise has determined that the amendments do not meet the statutory definition of a major
16 environmental rule set forth in Texas Government Code, §2001.0225; therefore, a regulatory analysis
17 conducted pursuant to that section is not required.

18 The Commission requests comment from affected parties regarding these amendments. In
19 particular, the Commission requests comments from affected municipalities regarding any potential
20 procedural impact to municipal operations arising out of these proposed rule amendments.

21 Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel,
22 Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at
23 <http://www.rrc.state.tx.us/legal/rules/comment-form-for-proposed-rulemakings/>; or by electronic mail to

1 rulescoordinator@rrc.state.tx.us. Comments should refer to Gas Utilities Docket No. 10362 and will be
2 accepted until 12:00 (noon) on Monday, August 25, 2014, which is 31 days after publication in the *Texas*
3 *Register*. The Commission finds that this comment period is reasonable because the proposal as well as
4 an online comment form will be available on the Commission's web site at least two weeks prior to *Texas*
5 *Register* publication of the proposal, giving interested persons additional time to review, analyze, draft,
6 and submit comments. The Commission encourages all interested persons to submit comments no later
7 than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be
8 considered. For further information, call Sarah Montoya at (512) 475-1958. The status of Commission
9 rulemakings in progress is available at <http://www.rrc.state.tx.us/legal/rules/proposed-rules/>.

10 The Commission proposes the amendments under Texas Utilities Code, §102.001, which gives
11 the Railroad Commission exclusive original jurisdiction over rates in areas outside a municipality and
12 exclusive appellate jurisdiction to review an order or ordinance of a municipality exercising exclusive
13 original jurisdiction; §103.022, which allows reimbursement to the governing body of a municipality for
14 the reasonable cost of services of a person engaged to the extent the applicable regulatory authority
15 determines reasonable; §104.001, which authorizes the Commission establish and regulate rates of a gas
16 utility; and §104.055, which authorizes the Commission to adopt reasonable rules with respect to certain
17 expenses used in computing the rates to be established.

18 Texas Utilities Code, §§102.001, 103.022, 104.001, and 104.055 are affected by the proposed
19 amendments.

20 Statutory authority: Texas Utilities Code, §§102.001, 103.022, 104.001 and 104.055.

21 Cross-reference to statute: Texas Utilities Code, §§102.001, 103.022, 104.001, and 104.055.
22
23

1 §7.5530. Allowable Rate Case Expenses.

2 (a) - (b) (No change.)

3 (c) A gas utility shall not otherwise be required to reimburse a municipality for the reasonable
4 cost of services of a person engaged under Texas Utilities Code, §103.022(a), unless the municipality
5 has:

6 (1) paid such fees and expenses; or

7 (2) by ordinance, expressly assumed the obligation to pay the fees and expenses of
8 persons engaged under Texas Utilities Code, §103.022(a), and declared that such obligation is not in any
9 way contingent upon the municipality's receipt of reimbursement under Texas Utilities Code,
10 §103.022(b).

11 (d) Absent a showing of good cause:

12 (1) rate case expenses reimbursed to a municipality under Texas Utilities Code,
13 §103.022(b), shall be recovered by the utility through rates effective only within that municipality; or

14 (2) when a municipality has joined a coalition of municipalities for the purpose of
15 pursuing rate case activities, rate case expenses reimbursed to the municipalities within the coalition
16 under Texas Utilities Code, §103.022(b), shall be recovered by the utility through rates effective only
17 within the municipalities belonging to that coalition.

18 (e) Reasonable rate case expenses of the utility shall be classified into three categories:

19 (1) required regulatory expenses, which shall consist of expenses the utility incurs that
20 are related to the initial filing of the statement of intent and the expenses the utility incurs to provide or
21 publish required notices;

22 (2) litigation expenses, which shall consist of expenses incurred after the utility files its
23 statement of intent, excluding the cost of providing notice; and


1 (3) estimated expenses, which shall consist of the costs the utility estimates it will incur
2 for potential appellate proceedings.

3 (f) The utility's required regulatory expenses shall be allocated uniformly to all customers
4 affected by the proposed rate change. The utility's litigation expenses and estimated expenses, to the
5 extent there are any, shall be allocated to affected customers in the municipalities or coalitions of
6 municipalities participating in the proceeding and affected customers subject to the original jurisdiction
7 of the Commission.

8 This agency hereby certifies that the proposal has been reviewed by legal counsel and found to
9 be within the agency's authority to adopt.

10 Issued in Austin, Texas on July 8, 2014.

11 Filed with the Office of the Secretary of State on July 8, 2014.


Cristina Martinez Self
Rules Attorney, Office of General Counsel
Railroad Commission of Texas