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**DISCOVERY LIMITATION RULE PROPOSAL  
AT THE PUBLIC UTILITY COMMISSION**

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# DISCOVERY LIMITATION RULE PROPOSAL AT THE PUBLIC UTILITY COMMISSION

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PUC Project No. 42330 was initiated in March 2014 as a “Proceeding to Propose New Procedural Rule 22.146, Relating to Limitations on Discovery in Rate Proceedings.” Not unlike the change to the discovery process at the Railroad Commission, the PUC’s proposal to limit discovery arose in the context of a separate rulemaking related to recovery of expenses for ratemaking proceedings, PUC Project No. 41622. Public utilities are allowed to request recovery of attorneys’ and expert witnesses’ fees (“rate case expenses”) incurred on behalf of the electric utilities and municipalities that have original jurisdiction over electric utilities’ rates, as part of the PUC’s decision on a rate change application. The PUC has to determine that the rate case expenses are reasonable before allowing the public utility to recover those expenses from the ratepayers. The PUC adopted a new Rate-Case Expense Rule, but ultimately allowed the Discovery Limitation rule proposal to expire without adoption.

### **I. Discovery as an Issue in Rate Case Expense Recovery – PUC Project 41622**

In the initial rate case expense rule proposal published by the Commission,<sup>1</sup> discovery was considered a relevant factor in determining the reasonableness of the rate case expenses which either the utility or the municipality was requesting to recover:

(b) Requirements for claiming recovery of or reimbursement for rate-case expenses. In any rate proceeding, a utility or municipality requesting recovery of or reimbursement for its rate-case expenses pursuant to PURA § 33.023 or 36.061(b)(2) shall have the burden to prove the reasonableness of such rate-case expenses by a preponderance of the evidence.

(c) Criteria for review. In determining the reasonableness of the rate-case expenses, the presiding officer shall consider all relevant factors, including but not limited to those set out previously, and shall also consider:

(1) whether the rates paid to, tasks performed by, and time spent on each task by an entity were extreme or excessive;

(2) whether there was duplication of services or testimony;

(3) the novelty of the issues addressed;

**(4) the amount of discovery;**

(5) the occurrence of a hearing; and

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<sup>1</sup> Proposal for Publication, 16 TAC § 25.245, 39 TEX. REG. 570 – 572 (Feb. 7, 2014).

(6) the size of the utility and number of customers served.

Numerous comments were filed regarding the Commission's proposed rate case expense rule, but the Joint Utilities' filing gave priority to discovery limitations as indicated by the first paragraph of their comments:

*The Joint Utilities appreciate and support the Commission's initiative to clarify in a rule the criteria that will be used **to determine the reasonableness of expenses incurred by utilities and municipalities in rate cases**. Because those rate-case expenses are ultimately borne by customers, the Joint Utilities believe that changes to the Commission's procedural rules should be made to **mitigate the forces that drive those costs**. For example, a number of commenters in this project have proposed that the Commission adopt the discovery rules included nearly two decades ago in the Texas Rules of Civil Procedure, which would remove some of the incentives that contribute to the ever-increasing discovery burden in rate-case proceedings and the attendant costs. While these proposed changes were not included in the published draft rule, the **Joint Utilities applaud the Commission's decision to address the impact of discovery on rate-case litigation in a new rulemaking** and look forward to commenting further in that project.<sup>2</sup>*

There were numerous comments that addressed what evidence should be required in order to recover the fees and costs related to discovery. It is helpful to an understanding of the Commission's Discovery Limitation Rule Proposal, to review the proposals concerning changes to the discovery provision that were *rejected* by the Commission when it adopted the Rate Case Expense Rule. The following proposals were rejected:

(a) add to the rule consideration of the amount of opposition to discovery, as well as the amount of discovery in the proceeding;

(b) delete the reference to discovery in the rule entirely because it might provide an incentive for a utility to provide less information in its application so that parties would be required to file additional discovery, *or* because it could be interpreted to penalize a municipality for conducting robust discovery; and

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<sup>2</sup> PUC Interchange Project 41622, Filing #49 (9/6/13) (Joint Utilities include: AEP Texas Central Company; AEP Texas North Company; CenterPoint Energy Houston Electric, LLC; Cross Texas Transmission, LLC; El Paso Electric Company; Electric Transmission Texas, LLC; Entergy Texas, Inc.; Lone Star Transmission, LLC; Oncor Electric Delivery Company LLC; Sharyland Utilities, L.P.; Southwestern Electric Power Company; Southwestern Public Service Company; Texas-New Mexico Power Company; and Wind Energy Transmission Texas, LLC.)

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