

**SOAH DOCKET 473-02-3154
PUC DOCKET NO. 25639**

| | | |
|---|---|----------------------------------|
| APPLICATION OF TEXAS-NEW MEXICO | § | PUBLIC UTILITY COMMISSION |
| POWER COMPANY FOR A WAIVER | § | |
| PURSUANT TO SUBST. R. 25.181(h)(3) | § | OF TEXAS |
| | § | |

PRELIMINARY ORDER

On March 22, 2002, Texas-New Mexico Power Company (TNMP) filed a request for a waiver of the requirements of P.U.C. SUBST. R. 25.181(h)(3). This rule sets the guidelines for the energy efficiency provisions of PURA § 39.905.¹ P.U.C. SUBST. R. 25.181(h)(3), in particular, states that an individual energy efficiency service provider (provider) and its affiliates may not receive more than 20% of the total incentive payments available for a particular standard offer program (SOP). TNMP only received applications from five potential providers for the Residential/Small Commercial SOP and four for the Hard to Reach SOP. TNMP believes that three of the five applicants in the Residential/Small Commercial SOP are affiliated to one another and three of the four applicants in the Hard to Reach Standard SOP are affiliated to one another. The applicants allegedly affiliated are SESCO, Quality Conservation Services, Inc. (QCS) and Free Lighting Corporation. TNMP contends that due to the lack of available potential project sponsors in its service area, it must offer contracts to these applicants in order to meet the requirements of PURA § 39.905. Therefore it seeks a waiver from P.U.C. SUBST. R. 25.181(h)(3). SESCO denies it is affiliated with QCS or Free Lighting Corporation and requested a hearing. Commission Staff, in its June 13, 2002 filing, states that there is insufficient evidence to make a determination of affiliate status of the three companies, but that the Commission should grant the waiver regardless whether SESCO, QCS and Free Lighting Corporation are affiliated.

¹ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2002) (PURA).

The Public Utility Commission of Texas (Commission) referred this case to the State Office of Administrative Hearings (SOAH) on June 3, 2002, for assignment of an administrative law judge (ALJ) to conduct a hearing and issue a proposal for decision. The order of referral requested that parties provide a list of issues for the purposes of a preliminary order. On June 13, TNMP, Commission Staff and SESCO, Inc. filed lists of issues to be addressed, issues not to be addressed and issues to be briefed. Based on the issues filed by the parties, the Commission issued an Order Requesting Briefing on Threshold Legal/Policy Issue on June 22. Commission Staff, TNMP and SESCO filed briefs on July 2.

I. THRESHOLD LEGAL/POLICY DETERMINATION

Parties filed briefs addressing the following legal and policy question. The following statement of position was reached in consideration of arguments of the parties. Accordingly, pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. §2001.058(c) (Vernon 2000 and Supp. 2002), the Commission states its position on the following threshold issue:

As a matter of law or policy, is the lack of potential project sponsors in a utility's service area sufficient basis on which to grant a waiver pursuant to P.U.C. Subst. R. 25.181(h)(3) without making a determination whether certain applicants are affiliated to one another?

P.U.C. SUBST. R. 25.181(h)(3) prohibits an energy efficiency service provider and its affiliates from receiving more than 20% of the total incentive payments available for a particular standard offer program. If a utility can demonstrate that it would not be able to meet its annual energy savings goal under this limitation, it may petition for a waiver of this limitation. The 20% limitation in P.U.C. Subst. R. 25.181(h)(3) was adopted to ensure that no one energy efficiency service provider would monopolize available funds, to encourage competition in the energy efficiency services market, and to give all potential project sponsors an opportunity to participate.

In this instant proceeding, only four energy efficiency service providers submitted applications in the Hard-to-Reach SOP and only five energy efficiency service providers submitted applications in the Residential/Small Commercial SOP. Consequently, every one of the applicants is ensured participation and the underlying issues addressed by the limitation are not present here. Further, the Commission takes note that no potential provider claiming that it may be denied the opportunity to participate in the programs at issue has intervened in this instant docket.

SESCO argued, however, that a utility cannot demonstrate its inability to meet its goal unless it is first determined whether one or more applicants are affiliated to one another. Staff and TNMP responded that the lack of potential applicants is a sufficient basis on which to grant the good cause waiver. The Commission notes that continuing this proceeding to determine whether two or more of the providers are affiliated will delay implementation of these programs to customers in TNMP's service area, and potentially result in TNMP not meeting its goal. Further, if it is shown that two or more of these providers are affiliates, the limited number of applicants in this case is sufficient to grant a waiver to the 20% limitation.

Accordingly, the Commission concludes that, based on the circumstances presented in this case, a waiver to the 20% limitation should be granted pursuant to P.U.C. Subst. R. 25.181(h)(3), without making a determination whether certain applicants are affiliated to one another. In making this conclusion, the Commission is making no decision regarding whether any providers are affiliates. Rather, the Commission decision is made regardless of whether any providers are affiliated

Because the Commission decision resolves all outstanding issues, the Commission requests that the SOAH ALJ return this matter to the Commission for administrative processing.

II. EFFECT OF PRELIMINARY ORDER

The Commission's discussion and conclusions in this Order regarding the threshold legal and policy issue should be considered dispositive of this matter. Questions, if any, regarding the threshold legal and policy issue may be certified to the Commission for clarification if the SOAH ALJ determines that such clarification is necessary. Any ruling by the SOAH ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS, the 15th day of July 2002.

PUBLIC UTILITY COMMISSION OF TEXAS

REBECCA KLEIN, CHAIRMAN

BRETT A. PERLMAN, COMMISSIONER