

**PUC DOCKET NO. 38929
SOAH DOCKET NO. 473-11-2330**

**APPLICATION OF ONCOR ELECTRIC § PUBLIC UTILITY COMMISSION
DELIVERY COMPANY, LLC FOR §
AUTHORITY TO CHANGE RATES § OF TEXAS**

DISSENT OF COMMISSIONER KENNETH W. ANDERSON, JR.

Oncor has elected to be taxable as a partnership, and, consequently, it does not pay any taxes itself. Instead, all of Oncor's items of income and deduction are allocated to its owners. Under the Texas Supreme Court's holding in *Suburban*,¹ Oncor is entitled to a reasonable allowance for federal income taxes, but the Commission has the discretion to determine an appropriate income tax expense to apply to Oncor, including the ability to base the tax expense on actual taxes paid by owners of a pass-through entity. Because approximately 19.75 percent of Oncor is ultimately owned by non-U.S. taxpayers,² parties should be able to obtain information through discovery and introduce record evidence on a reasonable income tax expense rate to use in calculating Oncor's expenses. By preventing parties from having access to the information requested in Cities' 3rd and 4th RFIs, parties, and ultimately, the Commission may have no means of considering other reasonable calculations of income tax expense except the expense rate proposed by Oncor. For example, if a portion of Oncor's owners do not pay taxes on interest, dividends and distributions paid to them by Oncor because of their status under U.S. income tax law, it would be reasonable for the Commission to calculate the impact of this reduction in tax expense in determining a reasonable income tax expense rate for Oncor. This reasonable method of calculating Oncor's taxes would be consistent with legal precedent.³

In Oncor's most recent rate case, the Commission did not decide the issue of the appropriate amount of tax expense as a matter of law but rather on the particular record evidence

¹ *Suburban Utility Corporation v. Public Utility Commission of Texas*, 652 S.W. 2d 358 (Tex. 1983).

² Oncor Application, Direct Testimony of Robert B. Hevert at 19, footnote 22. See also, *Application of Oncor Electric Delivery Company, LLC, for Authority to Change Rates*, Docket No. 35717, Order on Rehearing at 13 (Nov. 30 2009).

³ *Suburban* at 364.

before it.⁴ Neither, in that case, did the Commission approve the tax-sharing agreement between Oncor and its owners, but rather noted that it has considerable discretion to determine an appropriate method and amount of reasonable tax expense.⁵ Consistent with that decision, under the preliminary order, the determination of a reasonable tax rate is a substantive issue to be addressed in this case.⁶

In a rate-making proceeding, the regulated entity applying for a change in rates has the burden of proof in establishing the reasonableness and necessity of its operating expenses, including an expense amount for federal income tax. Accordingly, in this case, Oncor has the burden of proving that the income tax expense they have requested is reasonable. Parties have the right to obtain information that is reasonably calculated to lead to the discovery of admissible evidence.⁷ Because I believe that Cities' 3rd and 4th RFIs would allow the parties and the Commission to determine whether a 35 percent tax rate is appropriate or whether Oncor's tax expense should be reduced by a proportionate amount of any tax savings experienced due to the tax situation of Oncor's minority owners, and because the determination of an appropriate reasonable tax rate is a substantive issue to be addressed under the preliminary order, I respectfully dissent on the Commission's decision regarding Cities' 3rd and 4th RFIs.

⁴ *Application of Oncor Electric Delivery Company, LLC, for Authority to Change Rates*, Docket No. 35717, Order on Rehearing at 7-8 (Nov. 30 2009).

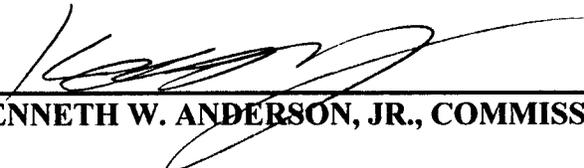
⁵ *Id.*

⁶ *Application of Oncor Electric Delivery Company, LLC, for Authority to Change Rates*, Docket No. 38929, Preliminary Order at 3 (Feb. 8, 2011).

⁷ TEX. R. CIV. P. 192.3(a).

SIGNED AT AUSTIN, TEXAS the 31st day of ~~April~~^{March} 2011

PUBLIC UTILITY COMMISSION OF TEXAS



KENNETH W. ANDERSON, JR., COMMISSIONER