

**TCEQ, Radioactive Materials Division
Legislation Implementation Stakeholder Meeting
August 15, 2008
10:00 a.m.
TCEQ, Bldg. E, Rm. 201S**

Minutes

**I. Opening RemarksStephanie Bergeron Purdue
Deputy Director, Office of Legal Services**

Today's meeting is to discuss the rulemaking that was continued from the August 6, 2008 agenda, in particular 30 TAC Chapter 336, Subchapter N concerning rates setting. Waste Control Specialists, LLC (WCS) will have an opportunity to express some of their concerns with the draft rule language. TCEQ staff will not be able to respond affirmatively or negatively to these concerns. Today is a good opportunity for dialog from all stakeholders. TCEQ staff will be in a listening mode.

**II. Overview of Draft Rule Language.....Susan Jablonski, P.E.
Director**

Initiated rulemaking in early February, and had an initial stakeholder meeting on February 15th to talk about the rulemaking and the concepts the Commission had directed us to look at as well as those initiated by the ED and implement legislation. We had a follow-up stakeholder meeting on April 25th to talk about concepts that were part of the rule and had dialog from stakeholders. In the meantime from the February 15th date, we were taking comments from individuals, posting them on the Website, and sharing them with the rest of the stakeholders to help with the dialog. We were also communicating with the Public Utilities Commission (PUC) as well as different parts of our agency that do the utility rate setting and trying to gather information to prepare the actual draft rule.

We also went to the states of South Carolina and Washington that set rules, set fees by rule, for their state-owned sites; and we looked at both their rules and discussed with the individuals that do those rate settings in those states to see what we can learn from those individuals of lessons learned. And so, the draft rule that was posted in July reflected those conversations as well as the input we had gotten from stakeholders through that date that is identified in the new subchapter of 336, which is Subchapter N.

In there, it starts out with definitions, which all of you, hopefully, have had an opportunity to look at since it's been posted. Those definitions are new to the Commission in many areas and some of them reflect statutory definitions for gross receipts and other things as well as what we had to include as some of the provisions that were statutorily laid out and giving the Commission the authority to set these rules. Additionally, there are information minimum requirements for rate-setting package. The idea is that the operator will come to the Commission with a proposed rate setting package that would then be reviewed and questions could be potentially asked back and forth. Then that rate-setting package would ultimately go to the Commission since the fees have to be set by rule; that would go back to the Commission as part of a proceeding. There would be an opportunity for a contested case hearing from individuals that were potential rate payers and that could get involved in the process in that way. The idea is that each year, these rates could be adjusted according to inflation as well as the rules set out different requirements both the operator as well as the rate payers could come forward and ask for adjustments to the rate.

There are some statutory tie-backs to relative hazard and other requirements of the basis of setting maximum disposal rates that are part of the rule. There is an addition the five percent (5%) payments that are required by statute that come from the gross receipt definition that are tied back as part of this rule; actually in a different subchapter, in Subchapter B which is a fee part of Chapter 336.

III. Discussion of Fee Setting.....Stakeholders

Rod Baltzer, President of WCS

When these rules were proposed a few weeks ago, it was the first time we have had a chance to see the details of the rules. As we went through and looked at them, we did determine that there is some more details that needed to be added and flushed out to make sure that as this goes forward and into the future, that if there is a contested hearing over rates that there is a little better guidance on exactly how it would be resolved. Our comments are rather extensive, but we think they will provide a little bit more clarity to the concepts already presented in the TCEQ draft. I have submitted for the record a hardcopy of our comments. These include a commentary explaining rationale for our revisions; a clean copy of our proposal, and a red-line copy comparing TCEQ initial draft to our proposal.

Bill Kroger, Baker Botts representing WCS

I would like to give some general comments first. I hope this could be interactive. I have not prepared formal comments other than the outline on the PowerPoint. I would like to provide in our comments, we have followed the basic framework that has been presented; and in some ways, we've refined some concept or provided some terminology. And other instances, we have codified some things to move several different concepts that are in different places, for example in what makes up a reasonable rate into one area.

We found some concepts that were not in the TCEQ draft that are sort of helpful comments or helpful rules to have in rate regulation to minimize the potential for dispute, for example in a later rate case.

I've put together a commentary to give you some helpful notes on why we put things in here and where our suggestions are coming from. It's not exhaustive; it's not with footnotes and citations; it's not every possible reason; but, I thought it would be some sort of a guide if you look at our comments and want to try to figure out why did they come up with this idea, it would give you, at least, some direction on the reason for the comment.

Conceptually, in Texas rate regulations, there are some terms of art that we tried to pull into our proposal of the model rules. One is the concept of the cost of rendering service, which is a mathematical number and is composed of two things, it's the sum of allowable expenses and the sum of the return on invested capital. We've used the term "allowable expenses" because that is a term that appears and used again in Texas rate regulation, particularly the Public Utilities Commission (PUC). The reason that I think "allowable expenses" is a good term to use is that those costs that are incurred in running this facility and maintaining it should be recoverable as part of the rate making. Operating and maintenance (O&M), in some context, is a narrower subset of those kinds of expenses; sometimes called, "O&M" expenses. And in rate regulation typically in Texas, you'll have O&M expenses as one of those components of recoverable expenses; but, there are others that aren't typically thought of as O&M expenses; and two important ones which are identified here are depreciation and taxes.

If you look at the TCEQ rules, there is a recognition that there will be depreciation, obviously; and that is an adjustment to the rate base, the capital assets get reduced annually by depreciation. But, then the

amount of depreciation is recovered in rates each year. The annual amount of depreciation is recovered in rates. The basic concept is that a rate should be a return of and on capital. The return on capital is the rate of return on your capital assets; the return of capital is the recovery of the actual costs of that capital through the annual depreciation charge. And so depreciation might be considered an example that is not O&M; but, is a recoverable expense. So, that would be in the definition of allowable expenses, as are things like Federal Income Taxes. So, if you look at my markup here, we have this general definition of allowable expenses but it goes to §336.1307(b); and §336.1307 is maybe the most important section of these rules. It is the section on Factors Considered for Maximum Disposal Rates. §336.1307(b) which you will see in my markup is the definition of allowable expenses. And if you look up the definition (b)(1) on page 8 of the markup, the first item is O&M expenses, which is something we have already discussed. One thing I thought was helpful, but not necessary, if it is something we decide that would rather leave it more general in nature, it can be done. But, one thing I thought was helpful was to try to identify some of those types of O&M expenses for this type of facility. The South Carolina Compact in their rules did that. They have a definition, they used allowable expenses also; they have O&M; and they identified categories of O&M expenses; so I sort of used that as a guide in putting together the kinds of O&M expenses this facility would have. I think that is helpful; but I don't know if it's necessary.

And then, you will see the other kinds of categories. One is depreciation and amortization. Depreciation is the annual depreciation amount on a tangible piece of property; amortization is how you depreciate an intangible asset. We have the different taxes, advertisings and donations, insurance expense, benefits; if you look on page 10, item 8, we also put in there things that are not typically considered in Texas to be allowable expenses. You will find that in the PUC rules. Typically, a regulated entity is not entitled to recover, for example, legislative advocacy expenses; political contributions, and penalties and things like that, fines. So, we have also included that. That is something would not typically be considered an allowable expense.

And then, page 10 item 9 is an important concept known as, "affiliated expenses." The way a lot of corporations, especially utilities and also this facility, they're often subsidiaries of parent companies and you will often have a holding company structure. For example, you might have the parent company that provides the accounting services, and the legal services, the building for the office; they might have one insurance program, one worker's comp insurance program that insures all the employees of the whole entity; and so, at the subsidiary level, you don't have-each subsidiary doesn't have their own accountant, each subsidiary doesn't have their own worker's comp program; so, some of these administrative expenses are done at the holding company level. And then those have to be allocated to the various subsidiaries. And so affiliate expenses can be a big issue in rate regulation because you want to make sure that the regulated entity that's recovering its expenses is not recovering more than it should; that the allocation methodology is fair; and that the expenses are reasonable. So if you look at the allowable expenses, there are 8 categories of examples of allowable expenses. Any of those could be incurred by the subsidiary or some of those can be paid by the parent on behalf of all of its subsidiaries; and there has to be an allocation done. So what I tried to include is a simple affiliate expense rule; and it's based on the rule that appears in the PUC rules. It's an important addition to add to the rules because it will at least identify what the standard is and the standard is that it has to be reasonable and necessary.

And if you look at the PUC rules, there's whole lot of details that are added in the PUC rules on the affiliate expenses. And so in a consistent approach that has been taken in these rules, we have tried to give a simpler definition of that because I think would be simpler for the facility.

The next topic is, “invested capital.” It’s very similar to the term used by TCEQ, “capital investments.” For practical purposes, we could use either term. The reason I suggested Capital Investment that is the term used in the Public Utility Regulatory Act provision that is cited in the statutes for this type of facility. There are several PUC statutes that are cited in the legislation, so that term is cited. And the other, that’s the common one that I’ve seen most commonly used in Texas for rate regulation.

The one clarification that we’ve had is what exactly is capital investment or invested capital? The TCEQ definition seems to primarily consider that invested capital is sort of tangible property. That is obviously an important part of what makes up the rate base. There is reference to it in the TCEQ rules about it being the property less the depreciation at the cost. It has to be used and useful. And that’s all generally correct. That’s an important component of the property, but there are also other types of assets that make up the rate base. If you look at §336.1307(d)(1) we have invested capital as including as a first item the original cost less accumulated depreciation. The TCEQ draft had depreciation; but, I think in accounted terminology, it is called an accumulated depreciation is the reduction of the asset and the appreciation expense is the income statement concept. And then §336.1307(d)(1) is very similar to the TCEQ definition and the next items are things that are assets that make up the rate base that would make up invested capital. One of them, for example, is working capital.

To run any business, you need a certain amount of working capital. And that is something that is in all rate bases for regulated entities. There is a way that has to be a reasonable amount of working capital; it has to be calculated; and we’ve got the generally accepted standard in there for what the amount of working capital is. There are things like regulatory assets, insurance reserves, customer deposits, construction work in progress. Construction work in progress is a project that is under construction as opposed to one that is completed. There are standards for the circumstances in which a project undergoing construction can be included in rate base. There are actually restrictions on that. If you look, we have incorporated those restrictions; it has to be that the inclusion of the project has to be necessary to the financial integrity of the licensee. Then show that the project has been sufficiently and prudently planned and managed.

There are self-insurance reserves. The company has a substantial investment that’s been made in the creation of this company. It’s an intangible asset that would be fairly considered but it is a capitalized cost of what it’s taken to get the facility to the point today. And that would be an item that would make a rate base and be amortized over time. And then, Item 7 on page 12 has the concept of known immeasurable post-investiture adjustments for known and measurable rate base additions and decreases. That is another concept that appears often in all utility regulation that the rate base can be adjusted for known and measurable changes. So those are the things that make up the things that we call invested capital. But, again, if you want to stick with the term capital investment, we can do that.

The third concept that is central to the rules is “rate of return.” Rate of return is what you make on your working capital or your invested capital. Again, it’s allowable expenses, plus a rate of return on the rate base, or also known as invested capital. We noted in the TCEQ draft, that there were in several different places concepts of factors that should be considered too in making up a rate of return. For example, if you look on page 5 of the black line draft, you’ll see a definition of reasonable rate of return and it is all crossed out. It’s not that we are rejecting that at all; it’s just that our thought is that it makes sense just like we had a group of definitions or components that make up allowable expenses; a group of definitions or components that make up invested capital, we thought that it would make sense to put all of those factors together in one group. And so, we stuck that, also on page 5 definition 15, rate of return, it cites to §336.1307(c). So, back there, §336.1307(b) is our allowable expenses; and we discussed that.

And §336.1307(d) is our invested capital; and §336.1307(c) is between the two and on page 10. And it's where we put together the factors for determining the rate of return.

One area that is very common in essentially all rate regulation is that the idea that in looking at the reasonable rate of return, one of the important considerations is the licensee's costs of capital. Because you want to look at when the licensee has stock and debt; what they are paying to attract that capital. How much does it take? And, what kind of return needs to be provided to attract that capital; so that the rate of return is in line with that. And we used the definition that was used in §336.1307(c)(3) on page 10; and we pulled from the PUC rules on this. Again, the PUC rules have a lot of detail on that, so we didn't try and capture every bit of that detail. But we put in there the basic concepts.

The fourth point of my presentation, I labeled it in my PowerPoint, "Other Important Proposals;" I guess I could have called it "Miscellaneous Items." The first is, §336.1305(b), that's really the old §336.1305(b) it's on page 6, and this may be the only example where we crossed something out that was proposed by the TCEQ that we thought at this point, at this evolution of the rules, wasn't necessary. There's some language in here that says on §336.1305(b), "the Commission may use any standard formula, method or theory of evaluation reasonably calculated to arrive at the objective of prescribing and authorizing fair, just and reasonable and sufficient rates." The reason we took that out is I think we are trying to accomplish that objective by having at least some rules in here to provide that methodology. And given that, we are going to come up with some rules on what makes a reasonable rate of return. For example, I thought it was confusing to have some language that said that some could read as interpreting that the examiner, for example, if at SOAH in a contested case, can just disregard all that and apply some other standard; maybe that is completely different.

I looked at the South Carolina Compact and I saw some of the concepts where they look at expenses, something like allowable expenses, and then mark them up by 35%. It looked like to me quite a different concept as opposed to the TCEQ approach, which is the out of pocket, the expenses are not marked up, they are what they are; plus then the rate of return on rate base. So, I think, again, we have stayed within the basic framework that TCEQ has, but, I thought by taking this out, we wanted to provide some clarity or reduce the possibility for some dispute as to whether a completely different standard could be applied.

The next point on my PowerPoint is §336.1305(b)—the new §336.1305(b). It just, what we've put in there is not a replacement for what is in there before I just used (b) for the provision. And that is some language that says that we may need some additional procedural rules. We've added some guidance on how rate making cases should be handled. But, there may be a need for some additional guidance for clarity on that. So, we stuck in a provision that some additional rules may be developed.

The next item is §336.1309(c), Discovery Limits and Confidentiality. In rate making, the way the discovery is typically asked for is Request for Information (RFI). That could also include documents; and so in a rate case, you may be producing in a highly contested case, at least on the electric utility side, thousands or tens of thousands of documents. And, given the nature of this facility and this sensitivity for example, it seems reasonable that a protective order is appropriate in the right case and right kind of discovery to protect the confidentiality of documents. And so, we have a rule in there for that.

We also have some guidance to the State Office of Administrative Hearings (SOAH) that SOAH should consider whether there should be other appropriate limits on the amount of discovery. For example, in Texas courts, you are limited on the number of interrogatories you can ask. SOAH in utility cases typically does not have the number of RFI's. You can be asked hundreds and hundreds of RFI's. And

sometimes, there is a need for SOAH to step in put some reasonable limits on the amount of discovery, the number of questions that can be asked, maybe the alignment of the parties. It has to be decided on a case-by-case basis. It is helpful to give some guidance to SOAH; that's something we expect them to do. To look at a particular case; if there's a lot of issues in dispute, that's one thing; if there is a few issues in dispute, that's might be another. To enter a protective order; a scheduling order; or a discovery order that would put an appropriate limits on the issues on discovery; alignment of the parties and things like that.

My next comment is §336.1309(a)(1). It's really a clarification for at least the assumption is that on rate making for all future years; we will be using actual numbers based on the actual allowable expenses are. But, at least in the initial year, presumably, it will be based on performa or projected numbers because we won't have any years of operation or we won't have a historical test year. §336.1309(a)(1) makes it clear that at least in the first year that the initial rates will be based on projected numbers.

The next comment is §336.1309(a)(5). That just clarifies an intervention standard. The PUC has an intervention standard; and is helpful to provide clarity as to who has standing in a case. This would be a rate making case; it wouldn't be a permitting case. Seems to me that the parties that would have standing would be customers who would be paying those rates; and so, we have provided some clarity on that.

The PUC has a rule on participation by members of a group; and we think that is a good idea. It's good for the customers and I propose that. The standard for intervention is articulated on page 14; it's the generally accepted standard, it's the standard that the PUC uses. It's generally a person who has standing is someone who has that right conferred by statute or law; or a justiciable interest. There is a body of case law as to what that means. It's a helpful concept because it helps SOAH decide, for example if there is a question if a party has standing or whether they have a justiciable interest.

The next concept is a provision for interim rates in §336.1309(c)(1) on page 14 of the black line. It's that in the appropriate case, if there is a protracted rate regulation preceding that interim rates can be ordered subject to a refund if the rate is deemed to be too high or a collection if the interim rate is deemed to be too low. It is adjusted after the rate case is over. And that can be a helpful concept in the initial rate case if we want to begin operations; if the customer is wanting to use the facility; but, we do not have a final decision yet on what the rate can be. We can have an interim rate so that business can begin subject to finalizing the rate case.

The next is §336.1309(e) on page 16, and what we have suggested is and will be helpful to everyone, and to the Commission to have a rule on what the standard of review is by the Commission of a SOAH decision in a contested case. As you know what would happen on a contested case is that it gets sent to SOAH, there is evidence presented, SOAH writes up a proposal for decision and it gets presented to the Commission. So, there needs to be some standard as to how the Commission decides whether or not to affirm the finding or not. So, we have put in some language that is based on the same standard that the PUC uses in reviewing a SOAH decision; and think it is a helpful thing to have. And, it's a comment §336.1309(f) and §336.1309(g) also go to what the Commission does when presented with a decision. §336.1309(e) is a standard of review, §336.1309(f) says that the Commission can then affirm the decision; reverse and render a decision; or remand it; it has three choices. And then, §336.1309(g) just confirms that a final order will be in writing and signed by the majority of the Commissioners.

§336.1311(d) is on page 17. This is one where it is an important concept and probably the TCEQ would agree that this is reasonable. The way we read the model rules, there is a provision in there that

obviously allow the Commission initiate a rate review. But, there was not explicit provision in there that allowed the licensee. If it's cost change, or if there was some sort of known immeasurable change that allow the licensee to initiate a rate review, which is a sort of a basic point. For example, an electric utility may have a rate case because the electric utility initiates a rate case or because the PUC decides to initiate a rate case. And so, we put in there a provision; it's §336.1311(d)(1). It just makes it explicitly clear that the licensee can file an application for a change in its cost of rendering service. It's actually an application for revision to its rate due to a change in its cost of rendering service.

§336.1313 is the extraordinary volume adjustment; and that's one I would propose—we should think about and probably require some additional discussion. The way that we read the TCEQ rules is that if there is an extraordinary volume, and that's defined, and we basically left that definition the same; then the way that's adjusted is in two ways. One is that the rate that is charged to the generator that creates the waste is reduced because of the larger volume; and it's sort of a blend between initial, implemental costs and the regulated rate. We had some tweaks, that's §336.1313(a). We made it clear that if the generator of that extraordinary volume and the licensee agreed to some other rate other than the prescribed one that would be okay. And that also, that extraordinary volume adjustment price may be revised if it's necessary because it's a change just like the maximum disposal rates could be revised.

§336.1313(b) is a more substantive change and that is because WCS is uncomfortable with the concept that extraordinary volume gets then put into the next year for setting the next year's rates. You might have, for example, an extraordinary volume in year one and have no extraordinary volume for the next four years. And, to have that extraordinary volume adjust; be an adjustment by lowering of the basic rate and then have no more extraordinary volume—nothing comparable for the next four or five years, or whatever it could be, is a concern. It gives rise also to the potential for some gamesmanship. Obviously, the licensee would have an interest in having the test year be a year with no extraordinary volume. On the other hand, the generators would have an interest in having the test year following a year where there is a lot of extraordinary volume. And so, we have a proposal we think is reasonable, which is that the extraordinary volume would not be used in an adjustment to rates, but also welcome more discussion on that. Those are frankly two extreme positions and maybe there is some room where we can all reach an agreement on what is a reasonable provision that would be acceptable to all sides.

The next item is §336.1315(a). Obviously the TCEQ wants to see what our cost of services is each year and see what our revenues are for each year because that's how the TCEQ can do its job in making sure that our rates are reasonable. We do not see anything in here that required us to file that. There was a requirement for us to file information showing our gross receipts; that makes sense because the tax provision. But, we didn't see anything in here that gave you the information that you need to be or need to do effective rate regulation on sort of an annualized basis. So we drafted some language in there as a start that we thought would be helpful for you. And put in there that we would need to come up with a form for that on how we would provide that information.

§336.1315(b) was an adjustment, but not intended to be a major adjustment. The TCEQ rules had in there that we would provide on the gross receipt statement an audited one with an unqualified opinion. In the PUC, the information that is provided on; what the revenues are; what the costs are; and also the gross receipt statement is typically handled by or provided by something more formal to be an attestation by the officer or manager of the regulated entity, here the licensee, certifying that those are true and correct. Essentially, that is under oath that this is true and correct information. That would be helpful in keeping the cost down some and also allowing us to get that information to you in a more timely basis rather than waiting for it to be audited by an outside auditor. If that is an important point to the TCEQ, we can talk about that; but it's probably a way to get or make sure we are providing you

accurate and reliable information; but, also reducing the cost and making sure we can do it in a timely basis.

Rene Ruiz, Cox, Smith Matthews representing South Texas Project (STP) Nuclear Operating Company
With me today is Johnny Houston; he's one of the radioactive waste specialists at STP and we're here to also to support our counterparts in the nuclear industry, those other owners of nuclear facilities that are subject to the compact. We want to ask staff to go ahead and proceed and present the proposed rules in the current form for the consideration of the Commissioners for publication. The current form of the proposed rules is a result of diligent work by TCEQ staff, stakeholders, including WCS who participated in the meetings. The day before the Commissioners were to consider the publication of the proposed rules WCS asked to submit changes to the proposed rules; changes that it did not discuss with staff or stakeholders in the stakeholder meetings. WCS claims that the re-notice of the proposed rules would be required if they were published in their current form and the TCEQ decided to make revisions to those proposed rules based on comments submitted by WCS. To cite a case, State Board of Insurance v. Deffenbach, what that case says is that re-notice may be required if the published rules are ignored or should subject other subjects or persons would be affected by the altered rules. Even assuming the TCEQ adopted WCS changes verbatim, the re-notice would not be required in this instance because WCS changes don't ignore the proposed rules as much as they modify albeit one-sided modifications and no other subjects or persons are affected by the changes. Therefore, we would request that the staff present the rules that are in current form. If however, staff or the Commissioners are inclined to consider WCS's changes then look at the PUC substantive rule 25.103. As the staff knows, the TCEQ statute requires the incorporation of certain sections out of the utilities code 36.051-36.053, and the PUC has adopted substantive rules to implement that statute. That is rule 25.103. If you put the WCS changes side-by-side with the PUC rule 25.103, it would be immediately obvious to you that they have cherry-picked from that rule. For example, the PUC rule expressly prohibits certain expenditures to be recoverable through rates; whereas the WCS's changes omit some of those prohibitions. Whereas the PUC rule prohibits the recovery of payments to affiliated interest without strict tests to be met, the WCS omits the tests. Where the PUC rule provides an inclusion of construction work in progress in rates as an exceptional form of rate relief, WCS omits the language as exceptional form of rate relief. WCS seeks to establish new procedural rules governing contested case hearings on rates when the TCEQ has already well-developed and established rules in that regard. WCS changes would limit the rights of affected parties to request a contested case hearing and severely restrict the amount of discovery that could take place. WCS changes also don't attempt to clearly limit recoverable expenses and rate base to expenditures or investments that are used in useful only to compact waste disposal facility services. In conclusion, we ask that the current form of the proposed rules be presented to the Commissioners on August 20th for consideration and publication. Any alternative of the Commission or staff are inclined to consider WCS changes to look at the PUC rule and see what is being done and allow other stakeholders to submit additional changes and comments to WCS's proposed changes.

Richard Adams representing the Lumina Generation, owner of the Comanche Peak Steam Electric Station

With me is Bob Knapp of the Comanche Peak Radiation Staff. We urge the staff of the TCEQ to go forward with the proposed rules without the proposed revisions that WCS has just submitted. This will allow all interested parties to present comments and proposed changes during the rulemaking process in an orderly fashion. Staff would then be able to review those comments and make changes to the rules before adoption if it believes that any changes are warranted. So, we would urge the publication of the staff's proposal; we would have some comments; if the staff moves ahead with its proposal, I suspect other parties will too. But, we believe that is the course of action that should be followed at this time.

What you have heard here this morning makes it abundantly clear that what WCS wants published is a rule that goes to great pains to pick and choose the parts of the PUC rules that it likes and it also goes to great pains to omit the parts of the PUC that it doesn't like. They've also, in addition to the comments that Mr. Ruiz made as to some of the specifics, they've also done some similar things with respect to the rate of return issue. That is going to be one of the major issues in this case. It is a major issue with respect to any rate setting proceeding. There will be major difference in opinion between experts as to the allowable rate of return that is used to establish rates for the compact facility. The WCS draft in part follows the PUC substantive rule on rate of return; but, it makes some important omissions to the concepts in that rule. One of them is that in the PUC rule 25.231(c). One of the important concepts omitted in the WCS draft and I quote from the PUC rule, "rate of return must be high enough to attract necessary capital but need not go beyond that."

Looking at their draft, specifically, exactly, what is the return on equity to be applied to? The PUC precedent and precedent of any rate setting mechanism that I have ever seen is that the return on equity is to be applied only to rate base, the invested capital in rate base; but, not to the cost of service—not to the O&M expenses. The applicant can recover its cost of service that the regulatory body finds as appropriate; but, you don't get a return on that cost of service. But the WCS draft at the top of page 8 of the red-line, says that the applicant, "gets a reasonable opportunity to earn a reasonable rate of return on its invested capital used in useful in providing service to the public." And, "it's reasonable and necessary expenses." Does WCS mean there that it also gets a return on its expenses? I don't know; that language is ambiguous. Perhaps WCS can tell us the answer to that on the record here this morning. In other words, if WCS pays out a \$100 in salary expense, does that mean by this language that it also gets a return on that expense? Surely, not under regulatory precedent, but under the language that WCS would like to have published, I could see how they make that argument.

Let me just make a couple of comments in addition to what I have just covered. Counsel for WCS mentioned about the test-year would be a prospective test-year. But, under the WCS draft, we must simply accept the test-year that they propose. And, it's not even clear that it has to be a historic test-year after the first rate case. They just say that the projected test-year in the first rate case and then after that, we all simply have to accept what WCS proposes as its test-year. And, that is simply unacceptable. As we all know, the state of Texas has through the legislature and government code, the TCEQ's own rules, through SOAH's rules, and through the PUC's rules, they have an elaborate system of procedural rules to govern contested cases. And, if you look at what WCS has tried to do here in their proposal this morning, the vast majority as what I read what they've done is to try and propose rather substantial limitations on discovery in the cases that involve the WCS application and subsequent rate cases. I believe that that would be grossly inappropriate to single out this proceeding and WCS rate applications for rather substantial limitations in discovery.

Bill Kroger

I would first like you to know that we tried to meet with the generators on Wednesday to have this exact same kind of presentation. They had just gotten our draft the day before and they canceled the meeting. And so, some of these concerns could have been answered and some of their concerns could have been reflected in a revision on Thursday so we would have at least another iteration to provide you. As you can see what has been provided to you, there are a lot of provisions in there that don't favor us that we suggested that are some basic concepts. And, I agree that I have not tried to include every provision that is in the PUC rules because the changes that I would have had to give you would have been levels of magnitude greater.

PUC rules are very, very extensive. I think their comments reflect why it's important to put the good ideas that are in here in the rules that come out from the TCEQ because that is the way you get discussion. By having the language out there, for example, that we propose, we will get some written comments on many of these; maybe all of these provisions; and then we can provide some additional comments and response to that. I think that it increases the dialog rather than having us wait until the draft was published before providing you these comments today.

We are not, just for the record, we are not seeking to recover a rate of return of our expenses. I think that it's a misreading of what we have written, but, if there is confusion or ambiguity there, we will be glad to revise that.

Edward Selig, Advocates for Responsible Disposal of Texas

We support the filing of the rules as published. Ms. Jablonski in her introductory remarks talked about the process that was deployed by the Commission. Dating back to February 15th with the original stakeholder's session, we participated as well as WCS in these early meetings where there was a full discussion of the various issues surrounding the rate-setting process. And then we also participated along with WCS in these stakeholder sessions on April 25th and had an opportunity to review the proposed rules since they were issued on July 18th. We have been participating in support of the process for the last several months. We may have some concerns about certain sections of the proposed rules but we are willing to bring them out during the public comment period so that everybody has a chance to look at in the full light of day. Today, we have heard some substantial comments from WCS that really constitute a major rewrite of the rules. And we think that everyone should have an opportunity to comment them during the comment period rather than just a last minute insertion before the Commissioners review next week.

I would like to read these remarks into the record on behalf of Entergy. Entergy is the holding company, which owns Vermont Yankee, which is one of the members of the Texas-Vermont Compact and Vermont Yankee will be disposing their waste at the proposed facility.

WCS proposes new procedural rules relative to the rate making hearing for low-level disposal site. However, those provisions do not create a comprehensive procedural scheme for those hearings. Many holes are left in the scheme that is presented. In addition, WCS's proposal would establish "some now, some later" approach to the creation of procedural rules governing contested cases. WCS proposed §336.1305(b) states that the establishment of a "system of procedures" shall take place after adoption of this subchapter. Yet, WCS proposed changes incorporate many procedural rules which attempt to do just that. (Please see §336.1309(a)(5)-(g) proposed).

On this subject, there is no need to reinvent the wheel. PUC has a well-established and trusted set of rules governing all aspects of rate cases, including visions dealing with standing. TCEQ has rules governing discovery as well as when and under what circumstances a group or an association may request a contested case hearing. The Texas Administrative Procedures Act and SOAH's Procedural Rules also contain a substantial set of rules for the conduct of contested cases. Such procedural schemes could wholly be adopted to apply to the setting; but it would not be a good idea to cherry-pick from existing rules. Procedural rules are designed to make sense and operate as a whole. If existing rules are to serve as a model, then care should be taken. And certain parts of those existing rules are deleted. And the procedural scheme should be developed as a comprehensive unit. At the same time, rather than 'some now, some later' approach being proposed in section §336.1305B. More thought needs to be given to the proposed procedural rules. As an example, WCS's proposed rules regarding contested case hearing consists of only 2 ½ pages of text and even then the provisions deal largely with limitations on

discovery. There is much more ground to be covered. Established at a fair and comprehensive rule scheme, a scheme that works with a logical and consistent unit should be the goal of the Commission. And that process should occur all at once. Taking advantage of the work that has already been done in this area by TCEQ, the PUC and the Legislature. We urge the staff of the TCEQ to go forward without the proposed rules with the new provisions proposed by WCS by midweek. This will allow interested persons to present comments and proposed changes during the rulemaking process in an orderly fashion. Staff would then be able to review those comments and make changes before adoption, if it believes those changes are warranted.

Pam Giblin, Baker Botts, representing WCS

I just wanted to comment on the administrative procedure options that we are and you all are facing today. The first time that anybody saw any language was, I think, July 17th and there is no problem with that; but, so often in rulemakings, there is more refinement after that first ink hits paper; and people see the language and you are seeing that today. This process is exactly what we would like to have work a little bit longer before it goes to the *Texas Register* for the following reasons:

If you were to go with the proposal as it is currently set out and sent out to the stakeholders and then you were to have gotten our recommendations, the questions that the Commission would be asking is could we, assuming that they were persuaded by our arguments, could they adopt that given what was put out in the Register? In the Deffenbach case, and later in the Workforce Commission case, I think illustrate that there was litigation over that. We think that these issues are sufficiently important and sufficiently complicated as your hearing today, to try and flush it out a little bit more. You might agree with these, you might not agree with these; but the question is almost a policy question, do you want to go with a rule that is more fulsome from which you can peel and reject or do you want to go with a skeleton and then be accused of bait-and-switch when some of these folks would waive any right to complain if the proposal was as skeletal as it is. So much like the Air Rulemakings, there is a lot more pre-publication, pre-proposal work done so that it almost more inclusive. Again, you've got this policy question of do you want to have more straw man out there for discussion. I think our draft has done a very good job of sort of raising the issues that we can either try and get resolution or we are going be duking them out in the rate hearings. I think again that in fairness to the Commissioners, if the question is asked on the 20th, next Wednesday, that if you go with the proposal that you have and if they were persuaded to adopt this, are the same folks going to be here saying, "no, you can't do that" because this is such a departure from the sort of more elemental proposal. Again, I tend to think that one option that you might want to consider is separating Subchapter N from the rest of the rulemaking and maybe taking a little more time. Maybe we sit down with the utilities; maybe we come in with some additional changes; like Bill explained, there is nothing set in concrete about our recommendations. We just wanted to upfront take on some of the issues that invariably have to be answered. They are either going to be answered in the rulemaking or they're going to be duked out rate making case by rate making case. We think that from a policy standpoint, you need to answer some of these questions. We would like to have the opportunity to work with the rest of the stakeholders with actual language and again, there is nothing that has to happen on the 20th because we're not going to be taking waste tomorrow as much as we would like to; so, we do have a little bit of time to make it correct.

It would be very interesting to see if anybody were to complain if the Commission to adopt the rule the WCS has proposed saying look at the contrast between what was proposed and what was adopted. Because again Deffenbach did take a law suit and in that case, of course, the agency went too far in the Workforce Commission case; the agency did not, in the Workforce Commission case the actual concept had actually put out in the proposal. There are things that are in here that are added to the proposal and again it is not a new category of people, but, again, it is a philosophical decision that you are going have

to make and we would urge you to take a little more time on this very important rulemaking and get everybody's input.

Rene Ruiz

Regarding the Deffenbach case, we don't think they are the sort of changes that would require a re-notice, for exactly the reasons that I already stated because they don't tend to ignore the rules that would be published and they wouldn't bring in new subjects or subject other persons that would be affected by the altered rules. However, for the record, we absolutely do not waive any rights with respect to the Deffenbach case.

Rod Baltzer

We have comments on a couple of others in Chapter 305. We thought that a modification program for the radioactive materials license section similar to the hazardous waste section would be beneficial (Class 1, Class 2, Class 3); that would clearly define what major/minor amendment and that type of thing is. Chapter 305.62(i)(1)(B) states that a major amendment is one that authorizes the receipt of waste from other states not authorized in the existing license. We understand that TCEQ absolutely has the authority for what kind of inventory based on the hazards; but this is really a geographical type question; we thought it better left in the case of the Texas Compact to the Texas Compact Commission. We'd like to see that one struck. As far as major amendments for changes in procedures or changes in facilities that improve health and safety that we thought would be better as an administrative amendment instead of a minor amendment; just to insure that those health and safety changes are done as quickly as possible. And, to better define in 305.62(i)(1)(K), when an environmental analysis is required and quote, "back to health and safety code."

Cyrus Reed, Lone Star Chapter of Sierra Club

I'll wait and make my comments on the other chapters until the rules are published and we have the public hearing.

**IV. Closing RemarksSusan Jablonski, P.E.
Director**