



RAILROAD COMMISSION OF TEXAS

HEARINGS DIVISION

GAS UTILITIES DOCKET NO. 10408 (Consolidated)

Appeal by Houston Pipe Line Company LP, Enterprise Products Operating LLC, Enterprise GC LLC, HSC Pipeline Partnership, LLC, Enterprise Texas Pipeline LLC, Enterprise TE Products Pipeline Company LLC, Flint Hills Resources Port Arthur, LLC, Valero Refining-Texas, LP, and Buckeye Development & Logistics, LLC Against the City of Texas City, Texas Regarding Texas City Assessment of Pipeline Fees

Appeal by Kinder Morgan Tejas Pipeline LLC Regarding Texas City Assessment of Pipeline Fees

PROPOSAL FOR DECISION

HEARD BY: Randall Collins – Administrative Law Judge
Rose Ruiz – Technical Examiner

PROPOSAL FOR DECISION BY: Jennifer Cook – Administrative Law Judge
Rose Ruiz – Technical Examiner

APPEARANCES:

FOR APPELLANTS:

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Mr. Gabriel Kaim
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Mr. James Mann
Duggins Wren Mann & Romero, LP

Mr. John Arnold
Winstead PC

REPRESENTING:

Houston Pipe Line Company LP
Enterprise Products Operating LLC
Enterprise GC LLC
HSC Pipeline Partnership, LLC
Enterprise Texas Pipeline LLC
Enterprise TE Products Pipeline Company LLC
Flint Hills Resources Port Arthur, LLC
Valero Refining-Texas, LP
Buckeye Development & Logistics, LLC
Exxonmobil Pipeline Company
Exxonmobil Oil Corporation

Kinder Morgan Tejas Pipeline LLC

FOR APPELLEE:

Mr. Christopher Johnson
Ms. Julie Berkshire
Lyons & Plackemeier

Mayor Matthew Doyle
Ron Plackmeir, City Attorney
David Zacherl, Fire Dept. Chief

OTHER:

Susan Davenport, In-house Counsel

REPRESENTING:

City of Texas City

ExxonMobil

PROCEDURAL HISTORY

Initial Appeal Filed Establishing Docket:	December 22, 2014
City Response Date:	April 13, 2015
Hearing Date:	December 9, 2015
Record Closed:	October 14, 2016
Proposal for Decision Issued:	January 13, 2017

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I. Statement of the Case¹

This case of first impression for the Railroad Commission (the “Commission”) is an appeal by various pipeline companies of annual fees charged by the City of Texas City (the “City”) during 2010-2014 pursuant to TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025.

Two almost identical statutes, TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025 (the “Statutes”), allow municipalities to assess a reasonable annual fee for the use of a municipality’s public right-of-way by an owner or operator of a gas, hazardous liquid or carbon dioxide pipeline facility.² The Statutes limit the charge such that it cannot exceed the cost to the municipality of “regulating the location” of the pipeline facility.³ The primary dispute in this case centers on whether the City’s annual charges for 2010-2014 are authorized by the Statutes.

The Statutes give the charged pipeline facilities the right to appeal, give the Commission exclusive jurisdiction to resolve these appeals and require the municipality to establish that the charge is authorized.⁴ Since these Statutes have been in effect, no prior appeals by a pipeline have been filed. This is a case of first impression.⁵ The twelve pipeline companies appealing the City’s charge (“Appellants”) are:

1. Houston Pipe Line Company LP,
2. Enterprise Products Operating LLC,
3. Enterprise GC LLC,
4. HSC Pipeline Partnership, LLC,
5. Enterprise Texas Pipeline LLC,
6. Enterprise TE Products Pipeline Company LLC,
7. Flint Hills Resources Port Arthur, LLC,
8. Valero Refining-Texas, LP,
9. Buckeye Development & Logistics, LLC,
10. Exxonmobil Pipeline Company,
11. Exxonmobil Oil Corporation, and
12. Kinder Morgan Tejas Pipeline LLC.

Appellants assert that to support the charge, the City wrongly relies on impermissible costs such as emergency response, construction and road maintenance costs. Additionally, Appellants claim the City’s evidence of costs is insufficient in that it is primarily based on estimates with little to no supporting documentation, and is not based on documented historical costs adjusted for known and measurable changes as required. The City asserts that the charges are reasonable and

¹ The hearing transcript in this case will be referred to as “Tr.” [pages:lines as necessary] “[description as necessary]”. The parties offered 32 Exhibits which were admitted. Tr. 12:22-25. The Exhibits will be referred to in the PFD as “Ex.” [exhibit no.] at [page no.] “[description if necessary]”. The only other exhibit admitted was a list of the joint stipulated exhibits, which was designated Trial Exhibit No. 1.

² TEX. NAT. RES. CODE § 117.102(b)(1) (applies to hazardous liquid and carbon dioxide pipeline facilities) and TEX. UTIL. CODE § 121.2025(b)(1) (applies to gas pipeline facilities).

³ TEX. NAT. RES. CODE § 117.102(c) and TEX. UTIL. CODE § 121.2025(c).

⁴ TEX. NAT. RES. CODE § 117.102(d) and TEX. UTIL. CODE § 121.2025(d).

⁵ See, e.g. Tr. 48:16 through 49:16.

its evidence of costs is sufficient. The City maintains that there are City expenses, such as road maintenance expenses, that are increased due to the presence of pipelines along rights-of-way and that the annual charge at issue should compensate the City for those increases in City expenses.

The Administrative Law Judge and Technical Examiners (collectively “Examiners”) respectfully submit this Proposal for Decision (“PFD”) for the Commissioners’ consideration and recommend that the appeal of charges for 2010-2013 be dismissed for failure to provide sufficient evidence that the appeal was filed within one year of first receiving written notice of those charges. As for the appeal of the City’s 2014 charges, the Examiners recommend that the Commission find that the appeal has merit and that the 2014 annual charge be reduced to \$2.72 per rod⁶ based on a total allowable cost of \$40,206.44. The Examiners do not recommend any additional charges because the Examiners find the City was unable to establish that any additional amount was authorized by the Statutes.

II. Background

This case involves an appeal of an annual charge the City assesses, pursuant to the Statutes, to owners and operators with gas, hazardous materials or carbon dioxide pipeline facilities⁷ on or along City rights-of-way. The city does not charge facilities for any pipelines that cross or that are perpendicular to a City right-of-way.

In 1968, the City charged an annual pipeline assessment rate of \$1.50 per rod; that fee was increased to \$1.99 per rod in 1991.⁸ In 2001, the City passed City Ordinance 01-55 (the “2001 Ordinance”).⁹ From 2001-2013, the 2001 Ordinance provided for an annual fee of 7.50 per rod for pipelines running along City rights-of-way.

In the 2013-2014 timeframe, the 2001 Ordinance was replaced by City Ordinance 13-23 (“the 2014 Ordinance”), which increased the annual charge to \$40 per rod for pipelines less than 24 inches in diameter and \$80 per rod for pipelines greater than 24 inches in diameter to be charged starting in 2014 through present.¹⁰

After the City’s adoption of the 2001 Ordinance and before adoption of the 2014 Ordinance, the legislature enacted the Statutes at issue in this case—TEX. NAT. RES. CODE § 117.102 (effective September 1, 2005) and TEX. UTIL. CODE § 121.2025 (effective June 19, 2009). The Statutes allow cities to assess “a reasonable annual charge.”¹¹ The Statutes limit the charge such that the charge:

...may not exceed the cost to the city of administering, supervising, inspecting, and otherwise regulating the location of the pipeline facility, including maintaining records and maps of the location of the pipeline facility.¹²

⁶ A rod is a unit of length equal to 5.5 yards or 16.5 feet. See, e.g., Ex. 11 at 4.

⁷ TEX. NAT. RES. CODE § 117.102 applies to hazardous liquid and carbon dioxide pipeline facilities and TEX. UTIL. CODE § 121.2025 applies to gas pipeline facilities.

⁸ See, e.g., Ex. 20, Enterprise Permits at 21-25 and The City of Texas City’s Closing Brief at 36 (filed January 22, 2016).

⁹ See, e.g., Ex. 5, Attached Exhibit A-I at 49-51.

¹⁰ See, e.g., Ex. 1 and 2.

¹¹ TEX. NAT. RES. CODE § 117.102(b)(1) and TEX. UTIL. CODE § 121.2025(b)(1).

¹² TEX. NAT. RES. CODE § 117.102(c) and TEX. UTIL. CODE § 121.2025(c).

The Statutes further provide that pipelines can appeal the annual charge for determinations as to whether the charges are authorized. The Commission has exclusive jurisdiction to resolve these appeals. If the Commission determines that the appealed charges are not authorized, the Commission can declare the charge invalid or reduce the charge to an authorized amount.¹³

In September 2014, the City sent invoices to the pipelines for annual charges from 2010-2014.¹⁴ The charges invoiced for 2010-2013 were calculated based on \$7.50 per rod; the amounts of charges assessed for 2014 were calculated based on \$40.00 or \$80.00 per rod (depending on the diameter of the pipeline at issue). Prior to this invoice, the City did not have a practice of sending invoices and instead relied upon the pipeline facilities to pay the annual charges without need of an annual invoice.

On December 22, 2014, the following nine pipeline companies filed an appeal¹⁵ of all assessed charges against them from 2010-2014:

1. Houston Pipe Line Company LP;
2. Enterprise Products Operating LLC;
3. Enterprise GC LLC;
4. HSC Pipeline Partnership, LLC;
5. Enterprise Texas Pipeline LLC;
6. Enterprise TE Products Pipeline Company LLC;
7. Flint Hills Resources Port Arthur, LLC;
8. Valero Refining-Texas, LP; and
9. Buckeye Development & Logistics, LLC.

On January 15, 2015, Kinder Morgan Texas Pipeline LLC ("Kinder") filed an appeal of the City's 2014 charge, which was consolidated into this case.¹⁶

On January 26, 2015, Exxonmobil Pipeline Company and Exxonmobil Oil Corporation filed a motion to intervene against the City in complaint of the City's 2010-2014 charges to them. The motion to intervene was unopposed and was granted, such that these parties are also appellants in this case.¹⁷

The City filed a response to the appeals on April 13, 2015.¹⁸ A hearing was held in this case on all appeals on December 9, 2015. Post hearing briefing was filed. The last post-hearing briefing submissions were filed on October 14, 2016.

¹³ TEX. NAT. RES. CODE § 117.102(d) and TEX. UTIL. CODE § 121.2025(d).

¹⁴ See, e.g., Exs. 2 and 4.

¹⁵ The appellants have referred to themselves as "Complainants" during this proceeding. However, because the Statutes and rules refer to this as an "appeal" of a municipality's charge, in this PFD this case is referred to as an appeal and the parties are referred to as the "City" and "Appellants" for ease of reference. Originally, Appellants' appeals were segregated into five docketed cases, which were all consolidated into this case on January 8, 2015. See Examiners' Letter No. 1 dated January 8, 2015.

¹⁶ Kinder's appeal was initially docketed as GUD Docket No. 10421. GUD Docket No. 10421 was consolidated with this case. See Examiners' Letter No. 2 dated January 16, 2015.

¹⁷ See, e.g., the City's second amended response in this case (filed November 20, 2015); see also 16 TEX. ADMIN. CODE § 7.6005 (allowing motions to intervene).

¹⁸ The deadline for the City's response was set by a procedural schedule issue by this case, which was agreed to by the parties. See Examiners' Letter No. 3.

III. Jurisdiction, Notice and Applicable Legal Authority

The Statutes, TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025, authorize the appeals in this case and give the Commission exclusive jurisdiction to decide the appeals, including upholding the City's charge, invalidating the charge or reducing it. Specifically, TEX. NAT. RES. CODE § 117.102 provides:

(a) Except as otherwise provided by this section, a city may not assess a charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a hazardous liquid or carbon dioxide pipeline facility on, along, or across a public road, highway, street, alley, stream, canal, or other public way.

(b) A city may:

(1) assess a reasonable annual charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal by an owner or operator of a hazardous liquid or carbon dioxide pipeline facility on, along, or across the public roads, highways, streets, alleys, streams, canals, or other public ways located within the city and maintained by the city; and

(2) recover the reasonable cost of repairing damage to a public road, highway, street, alley, stream, canal, or other public way located within the city and maintained by the city that is caused by the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a hazardous liquid or carbon dioxide pipeline facility if the owner or operator of the facility does not repair the damage in accordance with generally applicable paving standards or other applicable standards in the city.

(c) A charge authorized by Subsection (b)(1) may not exceed the cost to the city of administering, supervising, inspecting, and otherwise regulating the location of the pipeline facility, including maintaining records and maps of the location of the pipeline facility.

(d) The owner or operator of a pipeline facility may appeal the assessment of a charge under Subsection (b)(1) to the commission. The commission shall hear the appeal de novo. Unless the city that assessed the charge establishes that the charge is authorized by this section, the commission shall declare the charge invalid or reduce the charge to an amount authorized by this section. The commission has exclusive jurisdiction to determine whether a charge under Subsection (b)(1) is authorized by this section. The owner or operator of the pipeline facility and the city shall share equally the costs incurred by the commission in connection with the appeal.

(e) A city must file suit to collect a charge authorized by Subsection (b)(1) not later than the fourth anniversary of the date the charge becomes due. The running of the limitations period under this subsection is tolled on the filing of an appeal of the charge under Subsection (d) and begins running again on the date the appeal is determined.

(f) This section may not be construed to prevent a city from:

(1) recovering the reasonable cost of repairing damage to a city facility, other than a public way, caused by acts of the owner or operator of a pipeline facility; or

(2) requiring the owner or operator of a pipeline facility to relocate the pipeline facility, at the owner's or operator's expense, to permit the construction, maintenance, modification, or alteration of a city facility.

(g) Notwithstanding Subsection (f)(2), the city shall pay the cost of relocating a pipeline facility if the pipeline facility is authorized by a property right that has priority over the city's right to use the public way for the city facility.¹⁹

¹⁹ The language in TEX. UTIL. CODE § 121.2025 is practically verbatim as TEX. NAT. RES. CODE § 117.102. For simplicity, quotations of the statutory provisions in the main text of this PFD will be from TEX. NAT. RES. CODE § 117.102 and the citations will be to the language in both Statutes. TEX. UTIL. CODE § 121.2025 is specific to gas pipeline facilities, and is provided in its entirety as follows:

(a) Except as otherwise provided by this section or Section 182.025, Tax Code, a municipality may not assess a charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a gas pipeline facility on, along, under, or across a public road, highway, street, alley, stream, canal, or other public way.

(b) A municipality may:

(1) assess a reasonable annual charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal by an owner or operator of a gas pipeline facility on, along, or across the public roads, highways, streets, alleys, streams, canals, or other public ways located within the municipality and maintained by the municipality; and

(2) recover the reasonable cost of repairing damage to a public road, highway, street, alley, stream, canal, or other public way located within the municipality and maintained by the municipality that is caused by the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a gas pipeline facility if the owner or operator of the facility does not repair the damage in accordance with generally applicable paving standards or other applicable standards in the municipality.

(c) A charge authorized by Subsection (b)(1) may not exceed the cost to the municipality of administering, supervising, inspecting, and otherwise regulating the location of the gas pipeline facility, including maintaining records and maps of the location of the pipeline facility.

(d) The owner or operator of a gas pipeline facility may appeal the assessment of a charge under Subsection (b)(1) to the railroad commission. The railroad commission shall hear the appeal de novo. Unless the municipality that assessed the charge establishes that the charge is authorized by this section, the railroad commission shall declare the charge invalid or reduce the charge to an amount authorized by this section. The railroad commission has exclusive jurisdiction to determine whether a charge under Subsection (b)(1) is authorized by this section. The owner or operator of the gas pipeline facility and the municipality shall share equally the costs incurred by the railroad commission in connection with the appeal.

(e) A municipality must file suit to collect a charge authorized by Subsection (b)(1) not later than the fourth anniversary of the date the charge becomes due. The running of the limitations period under this subsection is tolled on the filing of an appeal of the charge under Subsection (d) and begins running again on the date the appeal is determined.

(f) This section may not be construed to prevent a municipality from:

(1) recovering the reasonable cost of repairing damage to a municipal facility, other than a public way, caused by acts of the owner or operator of a gas pipeline facility; or

(2) requiring the owner or operator of a gas pipeline facility to relocate the pipeline facility, at the owner's or operator's

Both Statutes begin by prohibiting cities from assessing charges, except as authorized by the Statutes. The pertinent language is:

(a) Except as otherwise provided by this section, a city may not assess a charge for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal of a hazardous liquid or carbon dioxide pipeline facility on, along, or across a public road, highway, street, alley, stream, canal, or other public way.²⁰

The statutory provisions following this initial prohibition allow a city to assess a reasonable annual charge for general use and operation by owners/operators of hazardous liquid, carbon dioxide, or gas pipelines on, along or across city rights-of-way, such as public roads.²¹ The charges at issue in this case are pursuant to this authorization. There is a limitation to the authorized charged in that it:

may not exceed the cost to the municipality of administering, supervising, inspecting, and otherwise regulating the location of the gas pipeline facility, including maintaining records and maps of the location of the pipeline facility.²²

A main point of disagreement between the parties is whether the charges at issue exceed the cost limitation in this provision.

The Statutes allow pipeline facilities to appeal such a charge to the Commission. The Statutes expressly state that the Commission has “exclusive jurisdiction” to determine whether such a charge is authorized. The City has the burden of proof to establish that its charges are authorized. If the City fails to establish the charges are authorized, the Commission can declare the charge invalid or reduce the charge to an amount authorized.²³

After the Statutes were enacted, the Commission adopted rules to implement the Statutes,²⁴ including providing standards for determining an appeal. In pertinent part, the rules provide:

(c) In determining whether an annual charge is reasonable, the Commission may consider:

(1) whether the charges assessed by the city against pipeline facilities are commensurate with charges assessed for other uses of public right-of-way in

expense, to permit the construction, maintenance, modification, or alteration of a municipal facility.

(g) Notwithstanding Subsection (f)(2), the municipality shall pay the cost of relocating a gas pipeline facility if the pipeline facility is authorized by a property right that has priority over the municipality’s right to use the public way for the municipal facility.

Section 182.025 of the Tax Code allows cities to charge public utilities who provide local sale and distribution within the city.

²⁰ TEX. NAT. RES. CODE § 117.102(a); TEX. UTIL. CODE § 121.2025(a).

²¹ TEX. NAT. RES. CODE § 117.102(b)(1); TEX. UTIL. CODE § 121.2025(b)(1).

²² TEX. NAT. RES. CODE § 117.102(c); TEX. UTIL. CODE § 121.2025(c).

²³ TEX. NAT. RES. CODE § 117.102(d); TEX. UTIL. CODE § 121.2025(d); *see also* 16 TEX. ADMIN. CODE § 7.6006(a).

²⁴ 16 TEX. ADMIN. CODE ch. 7, subch. F (*Pipeline Appeal of City Assessment of Annual Charge*).

the city, other than by franchised public utilities;

(2) whether the charges assessed by the city are commensurate with charges assessed against pipeline facilities in public right-of-way by other cities in Texas; and

(3) whether total costs of regulating pipeline facilities within the city are fairly allocated among all pipeline facilities, including whether the exclusion of any pipelines from the charges is reasonable.

(d) In determining whether an annual charge exceeds costs of regulating pipeline facilities,²⁵ the Commission may consider:

(1) historical costs attributable to regulating pipeline facilities adjusted for known and measurable changes, including out-of-pocket expenses and an allocable portion of the capital depreciation of specialized equipment and salaries, employee benefits, and reasonable overhead for city officials and employees engaged in and fairly attributable to regulating pipeline facilities;

(2) whether any costs advanced by the city to support the charge are attributable to the costs of activities other than regulating public right-of-way in the city, such as safety regulation, emergency response, or other action that is not required to administer, supervise, inspect, or otherwise regulate the location of a pipeline facility in public right-of-way in the city, whether or not authorized to be performed by the city; and

(3) whether charges assessed against pipeline facilities in the aggregate exceed the city's actual or reasonably expected costs of regulating pipeline facilities in public right-of-way in the city.²⁶

All parties were provided notice of the hearing and all parties appeared.²⁷

IV. Discussion of Evidence

All the evidence in this case was submitted as 32 written agreed Stipulated Exhibits consisting of written pre-filed testimony, deposition transcripts and other documents.

²⁵ The definition of "regulating a pipeline facility" in the rules is the same as the Statutes in that it is limited to "Administering, supervising, inspecting, and otherwise regulating the location of a pipeline facility, including maintaining records and maps of the location of the pipeline facility." 16 TEX. ADMIN. CODE § 7.6001(a)(5) (definition of "regulating a pipeline facility").

²⁶ 16 TEX. ADMIN. CODE § 7.6006(c) and (d).

²⁷ Tr. 16:12 through 18:7.

A. Evidence and argument of the City

The City asserts that it has increased expenses due to the presence of the pipelines and it wants the pipelines to pay the increases in costs the City bears.²⁸ The witnesses for the City stated the amounts \$40.00 and \$80.00 per rod in the 2014 Ordinance were based on the fact that the Port of Texas City (the "Port"), a private entity, charges \$40.00 per rod. Ultimately and during this case, the City performed and submitted a cost analysis claiming costs totaling \$402,787.02 or \$27.22 per rod. Of that amount, \$7,940.10 are costs incurred by the Fire Department and \$326,740.97 are costs incurred by the Public Works Department. The City maintains that these costs in the analysis represent increases in costs for the City's regular tasks due to the vast presence of pipelines along City rights-of-way and within the City's city limits.

The City maintains that its permits are outdated and that there are no current permits in the correct name.²⁹ This is even though a city ordinance requires the pipelines to file updated information every two years and provides for a fine. The pipelines do not comply, but the City has thus far not enforced the ordinances. The City does assert that it has a good relationship with industry.³⁰

1. The testimony of the City's mayor, Mayor Matthew Doyle

The City provided pre-filed testimony of the City's mayor, Mayor Matthew Doyle.³¹ The City has approximately 45,000 residents or approximately 700 per square mile. The City has heavy industry, particularly in petroleum and petrochemical refining. The Texas City Industrial Complex is a leading center of petrochemical industry. Supporting the industry is a large network of pipeline facilities. The City has roughly 244,000 feet of private pipeline using City rights of way and public property, which is equivalent to nearly 4,000 feet of pipeline per square mile.

The 2001 Ordinance provided for an annual assessment of \$7.50 per rod for pipelines located within City rights-of-way and required pipelines to provide maps of pipelines traversing corporate limits and 24-hour emergency contact info. It also required pipeline facilities to register any new information with the City and re-register every two years. Mayor Doyle testified that many facilities would fail to pay or only pay a fraction of the amount. Often facilities sold ownership interests without notifying the City, which caused new owners to avoid paying permit fees as well as the annual assessment. Facilities also failed to update emergency contact information.

In 2014, the City passed City Ordinance 13-23 to compensate the city for the use of its rights-of way and to help recoup costs associated with regulating the pipeline's use of city property. The new 2014 Ordinance provides for the annual assessment of \$40 per rod for rods less than 24 inches in diameter, and \$80 per rods more than 24 inches in diameter. In deciding to raise the fee, the City considered:

²⁸ See, e.g., City of Texas City's Response to the Railroad Commission of Texas' Request for Supplemental Information at 16 (filed September 30, 2016).

²⁹ Tr. 27:5 through 28:7.

³⁰ Tr. 26:10-12; Tr. 28:10-18; Tr. 45:12 through 46:5.

³¹ Ex. 1 (Direct Prefiled Testimony of Mayor Doyle).

- The need for compliance with the pipeline ordinance to ensure public safety;
- Historic non-payment of pipeline assessments;
- The need to update City records and data related to pipeline ownership and operation;
- Current City resources allocated to pipeline administration and safety;
- The need to allocate additional City resources to ensure compliance with City regulations; and
- There had been no fee increase in over ten years.

The City thought the increase would be reasonable in anticipation of increased costs and risks associated with regulating substantially more pipeline facilities than most municipalities. The City ultimately decided to increase its charge based on the charge charged by the Port of Texas City for similar use of its property by the same pipeline companies. The Mayor testified that there are substantial costs to various city divisions attributable to administration of the massive pipeline network within the City's corporate limits.

2. The testimony of the City's engineer, Doug Kneupper

The City provided the pre-filed testimony of City engineer Doug Kneupper.³² For the purpose of calculating the fee, he estimates the length of pipeline running on or along the City's rights-of-way of 244,169 feet, or 14,798 rods. He did not include pipelines that cross a right-of-way perpendicularly and does not apply the annual assessment to these crossings.

Mr. Kneupper testified that after the City passed the 2001 Ordinance, assessing an annual per rod fee of \$7.50, between 2001-2013 a majority of the pipelines did not pay.

In 2013, the 2001 Ordinance was replaced by the 2014 Ordinance. The City's new rate was heavily influenced by information received from representatives of the Port of Texas City, which charged \$40 per rod for pipelines.³³

One of Mr. Kneupper's responsibilities is to review the pipeline owner's proposed plans and spend time evaluating the location of the proposed pipeline. Prior to 2014, the City did not typically send out annual invoices. However, after the City determined that pipeline facilities were not paying the annual assessment, in 2014, the City sent all pipeline owners an invoice for unpaid assessments for the years 2010-2014.

He testified that the pipelines provide a substantial risk of danger and the police and fire department must have specialized hazard materials training to respond to incidents caused by the pipeline facilities.

He testified that the total amount assessed for 2014 was approximately \$653,396.

³² Ex. 2 (Direct Prefiled Testimony of Doug Kneupper).

³³ Ex. 5 at 1-3 (Ex. 5 is the City's Exhibits A-I to their prefiled direct testimony; Pages 1-3 comprise the comparison of fees assessed by other municipalities as testified to by Mr. Kneupper).

3. The testimony of the City's Fire Chief, Chief David Zacherl

The City provided pre-filed testimony of Fire Chief David Zacherl.³⁴ The parties also provided a deposition of the Fire Chief. He identified the costs he believes are associated with pipeline facilities, including what he referred to as inspections, emergency response costs, hazard materials training costs, and the cost of annual physicals.

Regarding hazard materials training, he testified that this training is required by the Environmental Protection Agency ("EPA") because of federal law requirements for employees who are expected to perform work related to actual or potential leaks or spills of hazardous substances.

The City's Fire Department serves all square miles of the City and has a hazardous materials response team that responds to a 13-county jurisdiction including the Texas City Industrial Complex.³⁵ The hazardous materials response team is required to be trained in hazardous materials in order to serve the industrial complex.³⁶ The Fire Chief has not reviewed the Statutes and is not familiar with them. He has provided financial figures of the Fire Department regarding pipelines. He is not opining on what costs are included in the Statutes.³⁷

He provided medical exam costs³⁸ because the exams are required by EPA to be prepared to respond to a chemical emergency. He estimates a 10% of total medical exams to pipeline inspection costs. He opines that is a reasonable estimate based on his experience and what he thinks is a "fair value." He does not have and did not rely on any documentation of costs.

Hazardous materials training is also required for emergency response.³⁹ He allocated 10% of total training costs to pipeline inspection costs. His estimate is based on his experience, and a "fair value," not documented costs.⁴⁰

He allocated an amount for the annual operating costs of emergency response vehicles as inspections.⁴¹ He stated that emergency responders are always looking for something unusual while doing other duties and looking for anything that would cause a hazard to the communities. He testified there are no specific pipeline inspections, just looking around as part of performing other duties. He described them as visual inspections, utilizing no tools, while going to and from emergency responses. Unless responding to an odor or leak call, the responders remain in the car unless they notice something unusual. The Fire Chief added the total time from when the vehicles left the station until their return to the station for all emergency responses. He then allocated 10% of that time to pipeline inspections. He opined that 10% is a "fair assessment." There are no pipeline inspection reports.

³⁴ Ex. 3 (Direct Prefiled Testimony of Fire Chief David Zacherl).

³⁵ Ex. 15 at 10-11.

³⁶ Ex. 15 at 11.

³⁷ Ex. 15 at 11-13.

³⁸ Ex. 15 at 13-15, 32-33.

³⁹ Ex. 15 at 13-15, 32-33.

⁴⁰ Ex. 15 at 34:1.

⁴¹ Ex. 15 at 15-28.

He also testified that 80% of what a Fire Department does is respond to medical events. He acknowledged that when responding to an emergency, the focus is to get there safely and quickly. The Fire Chief acknowledged that a majority of pipeline is buried which limits the ability to inspect pipelines while staying in the car and at the same time responding to emergencies.⁴²

He included an annual depreciation for an inspection vehicle⁴³ because it is the City's hazardous materials response unit. There is only one vehicle that is specifically designed for responding to an incident involving hazardous materials. It is capable of being utilized when responding to pipeline emergencies. He is not sure where the depreciation portion came from. He testified that it is a \$500,000 unit and it needs to be depreciated to have money to buy a new one when it ceases to function.

He states that the Fire Department responds to at least one incident every year related to a pipeline located on City property.⁴⁴

4. The testimony of the City's Director of Finance, Laura Boyd

The City provided pre-filed testimony of Laura Boyd, the Director of Finance.⁴⁵ She testified that the City originally relied on pipeline owners to submit payment of the annual assessments during 2001-2013 and no invoices were sent. However, only a small fraction of the assessments was paid. Not all operators paid and of the paying operators, not all paid the total amount owed. She testified that the City's "honor system" failed. Therefore, the City decided to send out invoices. She sent an invoice in 2014 for annual assessments for 2010-2014. Now it is the policy of the City to send annual invoices to the pipeline companies. The process of invoicing is time-consuming due to the owners who fail to notify the City of transfers and changes. Ms. Boyd provided a spreadsheet comparison of fee schedules of other municipalities.⁴⁶ Below is the information from the spreadsheet:

Pipeline Permit/Fees		
City	Reference	Fee Schedules
Angleton	Ord. Article XIII Sec 5-609, Sec. 22-61 Right-of-way	R.O.W. min \$1,000 + Sec. 22-61 Now \$1,200 Adj. Relocated/place \$500
Bay City	Chapter 62 Natural Resources Fee Schedule on Application	5/29 resent request ROX/Franchise Fees
Baytown	Pipeline Permit Checklist Pipeline License Agreement	Application Fee \$300.00/\$200.00 Annual for 30 years.
Beaumont	Pipeline License Agreement	License Agreement fee \$500.00 \$2.25 per linear foot of pipeline within the City right-of-way with application and annual
Corpus Christi	Article IV Sec 40-93 © Sec. 49-95	\$3000 Application Fee - nonrefundable \$1500 Annual License Fee or \$2.00 per linear foot in ROW

⁴² Ex. 15 at 34-35.

⁴³ Ex. 15 at 28-34.

⁴⁴ Ex. 3 at 6.

⁴⁵ Ex. 4 (Direct Prefiled Testimony of Laura Boyd).

⁴⁶ Ex. 5 at 1-3 (City's Exhibit A; Ex. 5 consists of the City's Exhibits A-I).

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Proposal for Decision

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Deer Park	Sec 42-80(d) Location of oil, gas, chemical and petroleum products within streets, alleys, and public places	Initial permit fee \$200.00 Annual fee \$300.00
Dickinson	Ordinance #422-2001 ORD: #537-2004	Crossing public St. Easement, public property \$1,000 First crossing Each additional crossing \$250.00 Within along public ROW \$1,000.00 Street rental charge ROW 2-8" diam=\$1.00 per linear foot 9-16" diam=\$2.00 per linear foot >16" diam = \$3.00 per linear foot Application fee - non-refundable \$500.00 Registration/Renewal Fee \$500.00
El Paso	No Written Policy	Treated like easements charge 8% of estimated value per sq ft per annum + a CPI adjustment
Freeport	Sec. 112.54-56	No Annual Fee/Contractual Dov Agreement/Royalties for Operating in City
Houston	Article IX Chapter 40 31+24 (C) 40+234(f)(1) 40+234(f)(2) 40+234(f)(3) 40+234(f)(4) 40+234(f)(5)	Oil & Gas Waste Application to drill, complete and operate a well for oil or gas Filing Fees, \$264.31 Pipelines, conduits, etc. across or under Streets, Permit Fee per person, \$2,114.59 Pipelines, conduits, etc. across or under Streets, Permit Fee per person, \$1,057.29 Pipelines, conduits, etc. across or under Streets, Formal fee per person during term of permit, \$1,057.29 Pipelines, conduits, etc. across or under Street Application Fee to construct a new pipeline, \$2,114.59 Pipelines, Conduits, etc. across along or under Streets. Adding a new pipeline to the Permit, \$528.64 Annual Fees Sec. 40-234(l)(3) A fee per person plus CPI Increase due payable January 1 each yr during 30-yr term of a permit ordinance
Lake Jackson	Se	Annually 2% of the annual gross receipts from sale of gas within the city
Laredo	Article VIII. Sec. 28-154; Sec. 28-155 ORD. NO. 2009-O-045 - SEC 28-215 Section 24-73 15.3 Oil & Gas Extraction & Production	Pipelines within Public Property Sec 28-154 \$1.00 per linear ft up to 8" diam + \$0.10 per inch of nominal diameter per linear ft over/above 6" diameter shall also apply to road/street crossing Excavations-Permit Application Fee \$50.00 Expedite Fee \$250 Inspection Fee \$200 Pipelines a franchise shall be first obtained from the City Council Sec. 24-73 15.3
League City	Sec. 42-198 Permit Pipeline Sec. 98-158 Const. Permits ROW Sec. 98-163? Bonds, LOC, Ins.	\$1,000.00 + \$1.00 per ft for each length of pie to be installed as license fee \$50.00 + \$0.10 per linear ft. of new or reconstruction facility cost to review plans & permit application & to administer permit
Orange	Sec. 4.1304 (b) Oil and Gas Wells	Fee set by resolution city council/Annual Fee
Port Arthur	Article II Sec 66-67	Major Permit Fee \$1,500 Administrative Level 1 \$100.00; Level 2 \$500.00 Annual Records Maintenance \$100.00
Waco	Right-of-Way permit	Right-of-Way permit - not responding to fee request
Webster	Pipeline Permit Fee Sec 34-178	New Pipeline \$2,000. <u>No annual fee</u> Adjust, Relocate or Replace \$2,000.00 Transfer ownership \$50.00 R.O.W. Use Permit Fee \$40.00 Drilling \$2,000.00

She provided ARKK Engineers' ("ARKK") proposal identifying the scope of services—to gather pipeline data and create GIS files and database—and cost of \$24,882. ARKK did a pipeline survey prior to the issuance of the invoice.⁴⁷

She provided a Fire Department Medical Exam Annual Expense Report for 2011 through October 28, 2015.⁴⁸ She provided a Fire Department Hazardous Materials Training Cost Analysis for FY 2007 through start of FY 2015 for a total of \$54,507.47⁴⁹

5. Testimony of CPA Helen Duvall

The City also provided the pre-filed testimony of Helen Duvall, CPA.⁵⁰ Ms. Duvall provided a cost analysis and cost allocation report for "work and services in relation to pipelines."⁵¹ The types of costs in the report include the cost of: medical exams, training, moving pipelines, ditch widening and slope paving, and cutting and plugging abandoned pipelines.⁵² There is a category called "Pipeline work"⁵³ costing \$402,787.02 divided by the number of rods (14,798) = \$27.22 per rod. "Regulation of Pipelines" is in title of analysis⁵⁴

The parties also provided a deposition of Ms. Duvall. She discusses the cost analysis.⁵⁵ She did not look at the Statutes. It was beyond the scope of her employment to determine what costs were within the Statutes.⁵⁶ She interviewed people and did not determine whether a particular cost should be included but took the costs as provided by the City. The estimates were provided to her by City employees.⁵⁷ She did not verify them. She was employed to compile the information provided by the City and put it in a presentable form to summarize the costs.⁵⁸

She was provided inspection costs by the Fire Chief. They include the annual operating costs of the inspection vehicles⁵⁹ (she does not know nature of inspections or if they occur or when).⁶⁰ Per the Fire Chief, Fire Department personnel are trained to inspect at all times when responding to and returning from emergency calls. On that basis, the City allocates 10% of the cost of responding and returning from city emergency calls. Ms. Duvall did no evaluation of this information. She just compiled the information given.⁶¹

One cost element is the depreciation from assets. The asset is 10% of a typhoon pumper. The percentage of 10% was supplied by the Fire Chief. This is the only vehicle depreciation cost

⁴⁷ Ex. 5 at 4-6 (City's Exhibit B); *see also* Ex. 1 at 7.

⁴⁸ Ex. 5 (City's Exhibit F).

⁴⁹ Ex. 5 (City's Exhibit G).

⁵⁰ Ex. 6.

⁵¹ Ex. 6 at 2.

⁵² Ex. 6 at 5.

⁵³ Ex. 6 at 5.

⁵⁴ Ex. 6 (Exhibit L attached this Exhibit).

⁵⁵ Ex. 14 at 13.

⁵⁶ Ex. 14 at 14-17.

⁵⁷ Ex. 14 at 17-27.

⁵⁸ Ex. 14 at 24.

⁵⁹ Ex. 14 at 27.

⁶⁰ Ex. 14 at 27-29.

⁶¹ Ex. 14 at 31-32.

included.⁶² She does not know what the vehicle is used for. The medical costs were also provided by the Fire Chief.⁶³ He allocated 10% of all medical exams and hazardous materials training.

She also discussed the public works costs in her report. For moving pipelines, \$200,000 per year was provided. She does not know any basis or historical costs for this amount.⁶⁴ Special project costs were included for the following:⁶⁵

1. A 31st street right-of-way ditch widening;
2. A Bay street/3rd avenue slope paving; and
3. The cutting and plugging of abandoned pipelines.

She primarily obtained the public works costs from Mr. Tom Kessler, Director of Public Works for the City.⁶⁶ There is an amount for street and bridge One-Call job preparation which she obtained from the City and does not know about nor need to since she merely compiles the information. There is a cost for contracted engineering. AARK provided an estimated cost per job of approximately \$12,000 per job and Mr. Kessler estimates 4 jobs per year at \$48,700. Mr. Kessler provided a cost associated with city project managers for projects managed pertaining to pipelines. Mr. Kessler provided a cost attributable to delays on street and bridge draining projects. She performed no independent evaluation. For the AARK engineer pipeline survey that was performed, she amortized the cost over 2 years, estimating that the City would need a pipeline survey every two years.⁶⁷

Ms. Duvall acknowledged she did not audit the City's cost elements. She further acknowledged that in performing an audit, it is not sufficient to rely on a person's statements and that documentation is required, such as invoices or times-sheets, to substantiate the cost.⁶⁸

6. Testimony of the City's Director of Public Works, Tom Kessler, P.E.

The City also provided the pre-filed testimony of Tom Kessler, P.E., the City's Director of Public Works.⁶⁹ He testified as to his opinion of the cost of regulating pipelines to the Public Works Department. The categories of costs he included are construction, maintaining and repairing City infrastructure and buildings and maintenance of water and sewage facilities. He testified that "nearly all of the work performed by Public Works is affected by the extensive pipeline footage on City rights of way . . . personnel deal with pipeline issues on a daily basis"⁷⁰ He testified that the City's use of One-Call is part of the cost. He estimates 211 One-Calls per year and 112 hours of personnel cost in One-Call costs in 2014.⁷¹ A GIS specialist spends an average of 102.75 hours per year to make One-Calls and determine ownership of pipelines at locations.⁷² He estimates

⁶² Ex. 14 at 32-34.

⁶³ Ex. 14 at 34-35.

⁶⁴ Ex. 14 at 35-37.

⁶⁵ Ex. 14 at 37-45.

⁶⁶ Ex. 14 at 45-61.

⁶⁷ Ex. 14 at 62.

⁶⁸ Ex. 14 at 12.

⁶⁹ Ex. 7.

⁷⁰ Ex. 7 at 3.

⁷¹ Ex. 7 at 4.

⁷² Ex. 7 at 5.

service costs of all projects is \$7000 more due to “pipeline mitigation.”⁷³ He estimates a cost due to delays caused by coordination efforts for street and bridge projects (5 estimated delays each year on average at \$2,754.40 for a total of \$13,774)⁷⁴ and delays on street and bridge drainage projects (10 estimated delays a year costing \$5,384.00).⁷⁵ He estimates the cost of removal of abandoned lines at approximately \$4,402 per year.⁷⁶

He estimates the cost of an outside engineering firm—for mapping and design—at \$12,175 per project at 4 projects per year for \$48,700⁷⁷ He estimates the cost of moving pipelines to be \$200,000 per project at one per year.⁷⁸ He opined that pipelines contribute to twice as much for utility repairs. He concludes the additional cost is \$11,265.⁷⁹

The parties also provided deposition testimony from Mr. Kessler. Mr. Kessler oversees the Street and Bridge Department, the Utilities Department, Construction Services, Fleet Management, Sanitation, and Rainwater Pump Stations.⁸⁰ He has never read the codes and rules at issue. He met with Ms. Duvall three times. He was asked to put together a list of public works costs “dealing” with pipelines. At the time of his deposition, he had not seen the cost allocation provided by Ms. Duvall.⁸¹ Testifying at his deposition about his preparation of the public works costs estimates, he states:

I was asked to put together the costs – our costs for dealing with pipelines, which is what I did. I have no idea which ones are applicable or not. . . . I don’t have any idea what is applicable.⁸²

He further testified:

We thought our way through how do we deal with pipelines. I’ve never thought about this issue at all. I didn’t know this was an issue until about six weeks ago, thereabouts.⁸³

He refers to a ditch widening project in which the City purchased three houses. He states:

I haven’t read the statute. I don’t know what the statute says. I don’t know where it is, what number it is. I know nothing about it.⁸⁴

He testifies regarding his estimate of pipeline relocation costs.⁸⁵ He is not sure about any such projects in the last four years. He can only remember one and asking the pipeline to pay for

⁷³ Ex. 7 at 5.

⁷⁴ Ex. 7 at 6.

⁷⁵ Ex. 7 at 7.

⁷⁶ Ex. 7 at 7.

⁷⁷ Ex. 7 at 9.

⁷⁸ Ex. 7 at 10.

⁷⁹ Ex. 7 at 14.

⁸⁰ Ex. 16 at 9.

⁸¹ Ex. 16 at 10-21.

⁸² Ex. 16 at 16:8-12.

⁸³ Ex. 16 at 17:1-5.

⁸⁴ Ex. 16 at 25:7-9.

⁸⁵ Ex. 16 at 24-36.

it. When the City has senior rights then the pipeline pays for it and vice versa. He testified he has no documentation to support the \$200,000 estimate and referred to it as “an off-the-cuff ballpark number.”⁸⁶

He discusses three projects that he referred to as “projects that involved pipelines.”⁸⁷ He further states, “It’s costs associated with dealing with pipelines in our right-of-ways.”⁸⁸ One project he referred to as the 31st street right-of-way project.⁸⁹ He obtained historical information about labor equipment and costs. A second project he referred to as the Bay Street and 3rd Avenue project.⁹⁰

He estimates an annual cost to cut and plug abandon pipelines.⁹¹ The City has cut and plugged six pipes over the last two years at an average per year of \$4,402. Prior to that, the City has not done any since 2002-2001.

For delays on bridges and street, his estimates are based on what he thinks the amount is dealing with pipeline conflicts. He has no supporting documentation.⁹²

B. Evidence and argument of Appellants

Appellants assert that the \$40 and \$80 in the 2014 Ordinance is not authorized because it is not cost-based and is instead based on what a private entity, the Port of Texas, charges. Appellants maintain the City’s cost analysis performed while this case was pending includes many costs not allowed under the Statutes, such as public infrastructure and emergency response costs. Per Appellants, the costs authorized by the Statutes are limited to the costs necessary to know where pipelines are located. Appellants further assert that even if such costs were allowable, the City did not provide sufficient evidence to support them.⁹³

1. Testimony of Daniel G. Gredvig

Appellant Kinder provided the pre-filed testimony of Daniel G. Gredvig.⁹⁴ Kinder has 1,170.06 rods along City rights-of-way. For years 2010 through 2013, Kinder was assessed \$8,775.45 (\$7.50 per rod) and Kinder paid that amount. For 2014, Kinder was assessed \$46,802.40, which Kinder did not pay because it believed the amount to be unreasonable.⁹⁵

Kinder disagrees with the City’s interpretation of the scope of the statute. Per Kinder, the City’s scope is too broad. For example, the City includes emergency response costs while

⁸⁶ Ex. 16 at 35:17-36:8.

⁸⁷ Ex. 16 at 37:15-16.

⁸⁸ Ex. 16 at 38:5-6.

⁸⁹ Ex. 16 at 40-47.

⁹⁰ Ex. 16 at 47-49.

⁹¹ Ex. 16 at 49-51.

⁹² Ex. 16 at 75.

⁹³ See, e.g. Complainants’ Closing Written Argument (filed January 22, 2016).

⁹⁴ Ex. 11.

⁹⁵ Ex. 11 at 7-8.

Commission rule, 16 TEX. ADMIN. CODE § 7.6006(d)(2), excludes safety and emergency response costs.⁹⁶

Mr. Gredvig testified that Kinder does not pay near as much in other places and contends the City's assessment is far from the norm. He provided examples of payments Kinder makes to other Texas cities: Dickenson - \$500 per year; Houston - \$1,000 per year; and Laredo-\$1,080 per year. Kinder argues that comparing the City's charge to other municipalities in Texas is a factor contemplated in Commission rules,⁹⁷ and such a comparison shows that the City's assessment of \$46,802.40 is not comparable. Mr. Gredvig concludes the City's increase in 2014 is unreasonable.⁹⁸

2. The testimony of Bruce H. Fairchild

Appellants other than Kinder provided the pre-filed testimony of Bruce H. Fairchild.⁹⁹ These appellants appeal both the 2010-2013 assessments as well as the 2014 assessments.¹⁰⁰

Mr. Fairchild testified that the City has not met its burden of proof regarding the 2014 assessment pursuant to the 2014 Ordinance.¹⁰¹ The City's charge mirrors the charge by the Port of Texas City for use of its private rights-of-way. He testified that the Port is a private entity and not a municipality. Commission rules allow comparisons to other cities, which are also limited to charging for costs. He states the Port is not subject to the statutory limit and can charge what the market will bear. He claims the City's assessment is not based on the cost of regulating the location of pipelines. There is no detailed analysis of the costs of regulating pipeline facilities, based on historical experience as required.

Mr. Fairchild maintains the City has not met its burden of proof regarding the 2010-2013 assessments pursuant to the 2001 Ordinance.¹⁰² He asserts that the City has provided no discussion or evidence to support the \$7.50 per rod assessment for 2010-2013.

He performed his own cost analysis.¹⁰³ He recognizes a total annual cost of approximately \$29,485 divided by the 14,798 rods located along the City's rights-of-way, which is equal to \$1.99 per rod.

He disputes the City's interpretation of the scope of the Statutes. He maintains that the Statutes' purpose is to allow regulation of the location of pipelines. He construes the Statutes much more narrowly than the City.

Mr. Fairchild testified that the City's costs are not based on historical experience adjusted for known and measurable changes and specific costs are not identified as required by Commission rule. He testified that general costs are paid through taxes assessed to all individuals and businesses

⁹⁶ Ex. 11 at 9.

⁹⁷ 16 TEX. ADMIN. CODE § 7.6006(c)(2).

⁹⁸ Ex. 11 at 10.

⁹⁹ Exs. 12 and 13.

¹⁰⁰ Ex. 12 at 3.

¹⁰¹ See, e.g., Ex. 12 at 3.

¹⁰² See, e.g., Ex. 12 at 3.

¹⁰³ See, e.g., Ex. 12 at 5.

(including pipelines), and not just pipelines in rights-of-way. He points out that police and fireman have to respond to all pipeline incidents, while only 7% of pipeline in the City's city limits is located along a right-of-way. Because the City also responds to incidents at refineries and chemical plants, City employees are required to have the training and medical exams anyway regardless of pipes in rights-of-way.

He points out that the City's cost analysis does not support a \$40.00 per rod amount and only supports \$27.22 per rod.¹⁰⁴ Mr. Fairchild provides a comparison chart of the City's analysis and his cost analysis. Mr. Fairchild's analysis supports a \$1.99 per rod while the City's cost analysis contains costs supporting \$27.22 per rod.¹⁰⁵

In Mr. Fairchild's analysis, Mr. Fairchild agrees with the City as to the Finance Department's cost of invoicing the annual charge, engineering costs to process right-of-way permits and the actual cost of the ARRK pipeline survey performed amortized over two years.

Mr. Fairchild disagrees with the City's inclusion of public works costs, fire department and fire marshal costs. Regarding the accountant's analysis, Mr. Fairchild testified that 16 TEX. ADMIN. CODE § 7.6006(d)(1) requires a cost analysis based on historical costs actually incurred and Ms. Duvall did not do this.¹⁰⁶

He testified that One-Calls should not be included because all excavators have to do One-Calls as part of the construction process, it is not a cost the City incurs regulating the location of pipelines.¹⁰⁷ He testified the City's costs were not specific.¹⁰⁸

Mr. Fairchild asserts that the Fire Marshal's permit review should be part of the permit cost, and not part of the annual assessment.¹⁰⁹ He claims abandoned pipelines should not be included.¹¹⁰

Mr. Fairchild asserts that a cost of 10 percent of the Fire Chief's time is only an estimate and not supported by any documentation.¹¹¹ He testified that he would have expected Ms. Duvall to do an analysis showing costs based on historical data with known and measurable adjustments. He states that instead, she merely compiled the information provided to her by the City.¹¹²

V. Examiners' Analysis and Recommendation

As to the appeal of the 2010-2013 charges, the Examiners recommend that appeals of those charges be dismissed. There is insufficient evidence that the appellants appealing those charges filed their appeal within a year of first receiving written notice of the appeal, as required by Commission rule. This issue is discussed in Section A. below. The Examiners recommend finding

¹⁰⁴ Ex. 13 at 5.

¹⁰⁵ Ex. 13 at 5.

¹⁰⁶ Ex. 13 at 20-22.

¹⁰⁷ Ex. 18 at 28-31.

¹⁰⁸ Ex. 18 at 35-44.

¹⁰⁹ Ex. 18 at 57-58.

¹¹⁰ Ex. 18 at 63.

¹¹¹ Ex. 18 at 66-68.

¹¹² Ex. 18 at 71-72.

the appeal of the 2014 charges has merit and recommend the Commission reduce the 2014 charge to \$2.72 per rod.

The parties dispute the scope of the Statutes at issue. Specifically, the parties dispute the scope of allowable costs that the City is authorized to recoup through the annual fee. Appellants construe the allowable costs more narrowly, taking the position that the language in the Statutes limiting costs to the “cost of regulating the location of pipelines” is limited and primarily consists of costs “necessary to know where pipelines are located.”¹¹³ Appellants disagree with the City that the scope of the statute authorizes costs related to the existence of the pipelines in the rights-of-way.¹¹⁴ The City construes the allowable costs more broadly, taking the position that all costs related to pipelines are included in the scope of the Statutes, such that increases in city public work costs and emergency response costs due to the presence of the pipelines in the City rights-of-way should be recoupable per the charges authorized by the Statutes. As more fully discussed in Section B., the Examiners construe the Statutes more narrowly based on tenants of statutory construction and the language of the rules implementing the Statutes.

The parties dispute the sufficiency of the evidence provided by the City in support of the costs it seeks to recover. Appellants maintain that the 2014 Ordinance of \$40/\$80 per rod charge is not supported by any cost analysis and is based solely on the fact that the Port of Texas City, which is a private entity, charges \$40 per rod. Regarding the cost analysis that the City ultimately put forth during this proceeding, Appellants maintain that it only purports to support approximately \$27.22 per rod but that much of it is based on rough estimates unsupported by documentation or historic costs. The City maintains that its cost analysis is based on reasonable estimates and documentation. As discussed in Section C, the evidence submitted by the City does not establish that the costs are based on documented historical costs with known and measurable adjustments, as required by Commission rules.

- A. The Examiners find that there is insufficient evidence that the appellants who seek to appeal the City’s 2010-2013 fee assessments filed their appeal within a year of first receiving written notice of it, which is a condition precedent to maintaining the appeal; the Examiners recommend these appeals be denied and dismissed.**

In this case, all Appellants other than Kinder¹¹⁵ (the “2010-2013 Appellants”) appeal the City’s 2010-2013 charges in addition to the 2014 charge. The City maintains these appellants have no right to appeal the 2010-2013 assessment because the appeal is untimely.¹¹⁶ The Examiners find there is insufficient evidence that the 2010-2013 Appellants filed their appeals within one year after first receiving written notice from the City, as required by Commission rule. Thus, the Examiners recommend that the appeals of the 2010-2013 charges be denied and dismissed.

To maintain an appeal of a city’s charge, a pipeline company must file the appeal “no later than one year after the pipeline receives the invoice for or a similar written notice of the charge

¹¹³ See, e.g., 2010-2013 Complainants’ Closing Written Argument at 2 (filed January 22, 2016).

¹¹⁴ *Id.*

¹¹⁵ Ex. 17 at 39.

¹¹⁶ There is no dispute that Appellants have met this requirement as to the appeal of the 2014 charge.

being appealed.”¹¹⁷ The 2010-2013 Appellants provide no witnesses or testimony on this issue and instead rely on the testimony of the City’s witness, Laura Boyd.¹¹⁸ Ms. Boyd is the City’s Director of Finance. Specifically, the 2010-2013 Appellants point to two statements in Ms. Boyd’s pre-filed testimony.¹¹⁹ The first is:

In September 2014, the City invoiced pipeline owners for past due assessments for the past four years (2010-2014).¹²⁰

The second statement is:

Based on my review of the City’s accounting records and my personal experience, during the period 2001-2013 the City relied on the pipeline owners to submit payment and did not bill pipelines for their use of the City’s property.¹²¹

While these statements do indicate no invoices for 2010-2013 were sent to the 2010-2013 Appellants until 2014, these statements do not address whether another earlier written notice of the charge was provided. The rule requires appellants to file within a year of receiving the invoice or other “written notice.”¹²² While they may not have received an invoice, the possibility of another form of written notice remains an open question.

The City provided testimony that it did provide written notice to permittees before the invoice. The person who processes permits for right-of-way use, Doug Kneupper, testified that he personally writes the annual assessment of this charge, based on the number of rods involved, on all permits.¹²³ Additionally, to show examples, the City submitted copies of some of Appellants’ permits that contain a written statement identifying the annual charge.¹²⁴ These permits are dated years ago. City witnesses testified that before the City started issuing invoices, permittees knew about the charge but many only paid portions of it or did not pay at all. The City maintains that is the reason it started issuing invoices.¹²⁵ The City notes that the invoices of the 2010-2014 assessments attached to Appellants’ initial complaint in this case show that Appellants had been paying charges. This also indicates Appellants had notice.¹²⁶ There is no testimony or evidence put forth that the invoices were the first written notice.

There is evidence that many pipelines did not inform the City of transfers of pipeline ownership, which was required by City ordinance. In such cases, the City did not know who the

¹¹⁷ 16 TEX. ADMIN. CODE § 7.6002(a).

¹¹⁸ See Complainants’ Response to Request for Supplemental Information at 1-2 (filed September 30, 2016).

¹¹⁹ *Id.*

¹²⁰ Ex. 4 at 5:123-124.

¹²¹ Ex. 4 at 2:44-47.

¹²² 16 TEX. ADMIN. CODE § 7.6002(a).

¹²³ Ex. 8 at 5:113-114.

¹²⁴ See, e.g., Ex. 20 at ENT 0211; Ex. 23 at HPL 0034.

¹²⁵ See, e.g., Exs. 1 at 1-4 and 4 at 1-4.

¹²⁶ The 2010-2013 Appellants argue that the invoices attached to their own complaint are not evidence and should not be considered. See Complainants’ Response to Administrative Law Judge’s Letter No. 9 at 2 (filed September 30, 2016). The Examiners note that facts in pleadings are judicial admissions and can be used as evidence against the pleader. See, e.g., *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). So, arguably these invoices could be considered evidence against the 2010-2013 Appellants. However, the issue is moot since the Examiners find there is insufficient evidence of a timely appeal, consideration of less evidence (if the invoices are not considered) does not remedy the insufficiency.

owners were due to the pipeline owner's failure to comply with the City ordinance.¹²⁷ There is no evidence as to whether the 2010-2013 Appellants complied with the ordinance requiring pipelines to identify new operator/owners upon transfers, such the City had information needed to provide notice of the charges to the 2010-2013 Appellants.

For these reasons, the Examiners find that there is insufficient evidence that the 2010-2013 Appellants filed their appeals of the 2010-2013 assessments timely as required by 16 TEX. ADMIN. CODE § 7.6002(a).

The ordinance authorizing the charge was enacted in 2013 and the invoice was sent in September 2014. No party disputes that the appeal of the 2014 charges is properly and timely before the Commission. An evaluation of the appeals of the 2014 charges follows.

B. The Examiners find that the canons of statutory construction indicate that the statutory language describing the scope of the costs allowable was intended to be construed narrowly.

The parties dispute the scope of costs allowable described in the Statutes. The meaning of the language in the Statutes is an issue of statutory construction. Appellants argue for a narrow construction of the statutory language, while the City argues for a broader construction.

The statutory language at issue limiting the scope of the costs that cities can recover is:

the cost to the municipality of administering, supervising, inspecting, and otherwise regulating the location of the gas pipeline facility, including maintaining records and maps of the location of the pipeline facility.¹²⁸

Appellants claim this scope only includes costs necessary to know where the pipelines are located.¹²⁹ Specifically, Appellants assert that the scope of costs is limited to:

- (1) Fees to supervise the collection of information necessary to determine where pipelines are located, to determine what products are transported, and to determine who owns and operates the pipeline,
- (2) Fees to maintain records and maps of the location of pipelines, and
- (3) Fees to administer the pipeline location information by contacting pipeline operators to obtain information and forward invoices.¹³⁰

The City asserts it includes additional costs the City incurs due to the presence of the pipelines, such as increased public works costs and emergency response costs.¹³¹

¹²⁷ See, e.g., Exs. 1 at 2-3; 2 at 3, 10-11; and 4 at 2-3.

¹²⁸ TEX. NAT. RES. CODE § 117.102(c); TEX. UTIL. CODE § 121.2025(c).

¹²⁹ See Complainants' Closing Written Argument at 9-10 (filed January 22, 2016).

¹³⁰ *Id.*

¹³¹ See, e.g., City of Texas City's Closing Brief (filed January 22, 2016).

The Examiners find that the City interprets the scope of costs too broadly and vaguely. However, the Examiners do not find it necessary to conclude that the scope is as limited as Appellants three categories enumerated above. The Examiners note that the three categories of costs Appellants claim are the only allowable costs do not include inspection costs even though “inspecting” is expressly allowed in the Statutes.¹³² While the Examiners agree with Appellants that the language is properly construed more narrowly, the Examiners leave open the possibility that the scope of the statute is in between the two positions put forth in this case. The Examiners base their recommendations on statutory construction principals.

When interpreting a statute, the goal is to ascertain the legislative intent.¹³³ Statutory construction begins with the language of the statute itself and its context, and if the language is clear, the plain meaning of the language is usually given.¹³⁴ In addition to the plain language, there are other construction aids, such as:

- (1) the object sought to be attained;
- (2) the circumstances under which the statute was enacted;
- (3) the legislative history;
- (4) the common law, including laws on the same or similar subjects; and
- (5) the consequences of a particular construction.¹³⁵

Looking at the plain language of the Statutes and utilizing the construction aids above, the Examiners find the Statutes should be construed more narrowly than the position put forth by the City.

1. The plain language of the Statutes indicates a limited scope of costs was intended.

To ascertain the legislature’s intent in enacting a statute, you look at the plain language in the statute’s words.¹³⁶ As stated by the Texas Supreme Court:

It is presumed the legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.¹³⁷

Both Statutes begin by stating that cities may not assess a charge against a pipeline for use of a right-of-way except as authorized by the statute.¹³⁸ Thus, any cost not authorized by the statute is expressly prohibited. This express limiting language indicates that there are constraints intended by the statute.

¹³² TEX. NAT. RES. CODE § 117.102(c); TEX. UTIL. CODE § 121.2025(c).

¹³³ See, e.g., *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) (referencing TEX. GOV’T CODE § 312.005 and *Texas Dept. of Protective and Regulatory Services v. Mega Child Care*, 145 S.W.3d 170, 176 (Tex. 2004)).

¹³⁴ See, e.g., *id.*

¹³⁵ See TEX. GOV’T CODE § 311.023; see also *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998).

¹³⁶ See, e.g., *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) (referencing TEX. GOV’T CODE § 312.003; see *Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)).

¹³⁷ *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010) (referencing *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985)).

¹³⁸ TEX. NAT. RES. CODE § 117.102(a); TEX. UTIL. CODE § 121.2025(a).

The language at issue states a city cannot exceed the cost to the city of “administering, supervising, inspecting and otherwise regulating the location of the pipeline facility, including maintaining records and maps of the location of the pipeline facility.”¹³⁹ The use of “regulating the location” of the facility also reflects a limitation. The City argues that the scope includes all costs related to pipelines. However, the legislature could have used language more broad such as “regulating the pipeline” or included language indicating an intent to include increased city costs due to the presence of the pipelines, such as increased maintenance and construction costs.

Additionally, the kinds of activity described provide insight into the legislature’s intent as to what types of activities are intended to be included. The activities listed—administering, supervising, inspecting and maintaining records and maps—are limited activities mainly involving paperwork, inspections and other traditional regulatory tasks. The City claims increased construction costs and other public work costs as well as emergency response costs are included. However, the legislature could have used a broader of description of activities had it intended to include additional costs for construction, road maintenance or emergency response, for example. Construction costs and emergency response costs seem far afield from the types of activities expressly identified.

The Examiners find that the language used by the legislature indicates an intent for the scope of costs to be limited and the types of activities limited to those similar to the ones enumerated. The Examiners find that the meaning of “regulating the location” of pipelines is inexact, so the Examiners look to other statutory construction aids for additional guidance.

2. The Statutes’ legislative history and the circumstances under which the Statutes were enacted including the object sought to be obtained indicate an intent to limit the charges a City could charge, supporting a narrower construction of the scope of allowable costs.

The original bill language contained more limiting language, that the charge may not exceed the cost “of maintaining records of the location of the pipeline facility.”¹⁴⁰ So, originally, the intent was to limit the scope of costs to maintaining records of the location of the pipelines—a much more limited construction than proposed by the City. The language of the bill was ultimately amended to its current form. While it is broader than this original language, the current language focuses on regulating the location of the pipelines and includes mainly activities necessary to maintain information about the location of the pipelines. It is difficult to imagine given the current language, that the intent with the amended language was to broaden the types of costs as claimed by the City to include public works, construction and emergency response costs. Appellants assert that the addition of words such as “administering,” “supervising,” and “inspecting,” was an acknowledgement of the types of activities necessary to know where the pipelines are located.¹⁴¹

¹³⁹ TEX. NAT. RES. CODE § 117.102(c); TEX. UTIL. CODE § 121.2025(c).

¹⁴⁰ Tex. S.B. 480, 79th Leg., R.S. (as introduced March 11, 2005).

¹⁴¹ Complainants’ Closing Written Argument at 10 (filed January 22, 2016).

To evaluate the circumstances under which the statute was enacted and the object sought to be obtained, the author's statement of intent provides insight. The first paragraph states:

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

Some municipalities have recently enacted ordinances that significantly increased the fees charged to pipeline companies to install, repair, or maintain facilities under, over, or along the public ways in municipalities. One pipeline operator estimates that under the new formula, a municipality would collect over \$100,000 per year from that operator alone.¹⁴²

This language indicates that the circumstances under which the Statutes were enacted was to limit the amount cities could charge and out of concern that cities would otherwise charge too much. It is interesting to note in this case, that the City did charge three operators over \$100,000¹⁴³ which appears, by the statement above, to be what the author was seeking to prevent.

The City relies on a statement in the Fiscal Note prepared by the Deputy Director of the Legislative Budget Board in support of its assertion that road maintenance and other costs are intended.¹⁴⁴ It states:

By imposing a one-time charge for usage of the public ROWs located within and maintained by the municipality, it would incur a revenue gain that would help offset maintenance costs for those public ROWs. Authorization to charge to recover the costs of repairing damage caused by the pipeline would provide a savings to the municipality.¹⁴⁵

However, as Appellants note, that same language was included in the introduced version, which contained the language limiting costs to the cost "of maintaining records of the location of the pipeline facility,"¹⁴⁶ which more clearly excludes construction costs, road maintenance costs and other costs proposed by the City.¹⁴⁷ As Appellants also note, a fiscal note is not written by members of the legislature and does not purport to convey legislative intent.¹⁴⁸ The Examiners give the statement in the Fiscal Note little weight in this instance.

The Examiners find that the legislative history of the Statutes supports a narrower construction intended to limit a city's authority to charge and does not support the broad construction proposed by the City.

¹⁴² Bill Analysis, Tex. S.B. 480 79th Leg., R.S. (as introduced March 11, 2005); Ex. 29, Exhibit B, Bill Analysis, Tex. S.B. 480 79th Leg., R.S. (April 1, 2005).

¹⁴³ See, e.g., Complainants' Closing Written Argument at 12-13 (filed January 22, 2016).

¹⁴⁴ Fiscal Note, Tex. S.B. 480, 79th Leg., R.S. (as engrossed April 26, 2005) (included in Ex. 29 as the last two pages).

¹⁴⁵ *Id.*

¹⁴⁶ Tex. S.B. 480, 79th Leg., R.S. (as introduced March 11, 2005).

¹⁴⁷ Fiscal Note, Tex. S.B. 480, 79th Leg., R.S. (as introduced March 13, 2005).

¹⁴⁸ Complainants' Closing Written Argument at 13 (filed January 22, 2016).

3. **Common law, including laws on the same or similar subjects, indicate that grants given to pipelines—such as grants allowing use of rights-of-way—are in the public interest and should be liberally construed; the Examiners find that statutes that are hindrances to these grants—such as charges for the use of rights-of-way—are properly narrowly construed.**

Another aid of construction in this case is to examine the common law and other laws involving pipelines. As Appellants point out, the history of the treatment of pipelines demonstrates that the use of pipelines is determined to be in the public interest, and the law has favored pipelines and the ability of pipelines to be unhindered and economically lay pipelines for transportation across the state.¹⁴⁹ In 1928, the Austin Court of Civil Appeals discussed this history as follows:

In 1917, the Legislature declared pipe line companies to be common carriers, and in 1919 conferred the right of eminent domain on them and in the same years other comprehensive regulatory statutes concerning them were enacted. Articles 1497, 6018, 6020, 6022, R. S. 1925. We do not deem it necessary or proper to quote at length from these statutes, but, suffice it to say, a general summary shows them to provide: (a) That a pipe line corporation is a public service corporation charged with a public use, and subject to public regulation; (b) that it is a common carrier authorized to operate pipe lines “between different points in this state,” and to transport crude petroleum by pipe lines, “from any oil field or place of production within this state to any distributing, refining or marketing center or reshipping point thereof, within this state”; (c) that it has the right to own and occupy “such lands, right of way, easements, franchises, buildings and structures as may be necessary to the purposes of such corporation”; and (d) with right of eminent domain first, to appropriate “lands and property * * * of any persons or corporation * * * as may be necessary to the purposes of such corporation”; and, second, to appropriate “rights of way or easements” on private lands and properties across and under which to lay its pipe lines, and has the right to lay its pipe lines “across and under any public road or highway, street, railroad, canal, or stream, etc., in this state.”¹⁵⁰

The court went on to discuss that grants given are to be construed liberally:

These rules are, first, that the grant of express statutory power to public service corporations carries with it by “necessary implication the grant of every other power necessary and proper to the execution of the power expressly granted”; and second, “that a public grant for public advantages must be construed liberally,” so as to reasonably effectuate the purposes of the grant. It is true that the cases cited do not construe the pipe line statutes, but construe similar and analogous statutes with regard to common carrier railroad corporations and public service irrigation corporations with right of eminent domain, and, in substance, hold that statutes granting to such corporations right of eminent domain to appropriate private lands and properties necessary to the purposes of such corporations by necessary implication grant power and authority to such corporations to appropriate from the

¹⁴⁹ Complainants’ Closing Written Argument at 4-8 (filed January 22, 2016).

¹⁵⁰ *Humble Pipe Line Co. v. State*, 2 S.W.2d 1018, 1019 (Tex. Civ. App.—Austin 1928, writ ref’d).

public domain, though no express authority is given by statutes to do so, such lands or waters as are “necessary and proper to the execution of the power expressly granted”; and “that a public grant for public advantages must be construed liberally” so as to effectuate the purposes of the grant.¹⁵¹

As discussed, the grants given to pipelines are in the public interest and are to be construed liberally. The Examiners find that limitations or hindrances on this grant, such as the charges in the Statutes in this case, are consequently properly construed more narrowly. In 1941, the El Paso Court of Civil Appeals continues this sentiment:

The construction and operation of common carrier pipe lines are now recognized as necessary and indispensable to a proper and economical exploitation of the petroleum, natural resource. They are of great importance to the public. Private property owners, the producers of crude oil, and the public are interested in the expeditious and economical transportation of oil from the producing fields and the distribution of it to the consuming public and industry. Pipe line transportation is the best mode yet provided. The public has an interest in relieving other means of transportation and its highways of the burden they would have to carry but for pipe line transportation. Hence the Legislature has recognized the pipe line as a public convenience and modern necessity and a business of public concern. In the Act defining them to be common carriers and regulating them as such it has declared it to be a business in the conduct of which the public is interested. In the same Act (Chap. 30, *supra*) it confers the right “to lay, maintain and operate pipe lines, together with telegraph and telephone lines incidental to and designed for use only in connection with the operation of such pipe lines along, across or under any public stream or highway in this State.” Vernon's Ann.Civ.St.Art. 6020. It has extended the public policy of the State to embrace them as other common carriers and public utilities.¹⁵²

In 1960, the Houston Court of Civil Appeals states:

The importance of pipe lines to the entire state is well recognized. *Continental Pipe Line Co. v. Gandy*, Tex.Civ.App., 162 S.W.2d 755, error ref., w. o. m. The grant of right to certain companies under Articles 6020, 6022 and 1497, V.A.C.S., including the right of eminent domain, was evidently designed to facilitate inter-county transmission of petroleum products.¹⁵³

Additionally, the legislature has codified the right of pipeline facilities to lay and maintain pipelines along public rights-of-way.¹⁵⁴ As these cases and common law discusses, the pipelines are in the public interest and the law supports the facilitation of this form of transportation.¹⁵⁵ The grants given have historically been construed liberally. The Examiners believe it appropriate to view hindrances to these grants and to the facilitation of this transportation, such as the additional

¹⁵¹ *Id.*

¹⁵² *Cont'l Pipe Line Co. v. Gandy*, 162 S.W.2d 755, 757 (Tex. Civ. App.—El Paso 1941, writ refused w.o.m.).

¹⁵³ *Harris Cty. v. Tennessee Products Pipe Line Co.*, 332 S.W.2d 777, 780 (Tex. Civ. App.—Houston 1960, no writ)

¹⁵⁴ TEX. UTIL. CODE § 181.005; TEX. NAT. RES. CODE § 111.020.

¹⁵⁵ See, e.g., *Harris Cty. v. Tennessee Products Pipe Line Co.*, 332 S.W.2d 777, 780 (Tex. Civ. App. 1960);

costs allowed by the Statutes in this case, narrowly in contrast to the liberal construction given to the grants.

In summary, the Examiners determine that generally the scope of costs in the Statutes is intended to be limited. Each particular cost is discussed in Section C.3., within the context of this statutory construction analysis.

C. The Examiners find that the City established authorized and substantiated costs totaling \$40,206.44 which is \$2.72 per rod.

In this case, the city has the burden of establishing the charge is authorized by the Statutes.¹⁵⁶ The charges must be reasonable and cannot exceed the cost of regulating the location of pipelines. In enacting the 2014 Ordinance, which establishes the \$40 and \$80 per rod charge—depending on the diameter of the pipe—the City relied on the fact that the Port of Texas City charges \$40 dollars a rod. A cost evaluation was not performed until after this case was initiated. During this case, the City provided a cost analysis purporting to support a \$27.22 per rod charge.

As more fully discussed below, the Examiners find that the charges can be no more than the costs the City establishes it incurs to regulate the location of pipelines. Further, while the City purports to establish costs of \$27.22 per rod, the Examiners find that the total authorized costs the City can establish is \$2.72 per rod.

When enacting the 2014 Ordinance, the City based the amount of the charge on what the Port of Texas City was charging and did not base the amount on what the Statutes authorized. Nor did the City track or evaluate its actual allowable costs in support of the charges. The cost analysis was performed after this case was initiated. Consequently, the City appears to have little actual documentation to support costs, often relying on rough estimates not based on documented costs and often not specifying what activities the costs represent. Commission rules require that the costs be based on actual historic costs adjusted for known and measurable changes.¹⁵⁷ The rules also state that these appeals will be handled by the Commission's general standards for establishing just and reasonable rates.¹⁵⁸ The Examiners find that the City's evidence of costs for the most part fell short of this standard.

In addition, the City construes the Statutes broadly and ambiguously—characterizing the scope at times as “relating to pipelines,” cost involving “pipeline issues,” issues “dealing with pipelines” etc. Even so, the City is unable to support its \$40 and \$80 per rod charge and ultimately purports to support \$27.22 per rod via an analysis of allowable costs.

The Examiners find that the City did not establish that any of the disputed costs are authorized by the Statutes. While each cost is discussed separately, below is a table summarizing all costs (disputed and not disputed):

¹⁵⁶ TEX. NAT. RES. CODE § 117.102(d) and TEX. UTIL. CODE § 121.2025(d).

¹⁵⁷ 16 TEX. ADMIN. CODE § 7.6006(d)(1).

¹⁵⁸ 16 TEX. ADMIN. CODE § 7.6001(d).

	City's position ¹⁵⁹	Appellants' position ¹⁶⁰	Examiners' recommendation
public works department	\$326,740.97	\$0.00	\$0.00
fire department costs	\$47,940.10	\$0.00	\$0.00
engineering costs	\$8,188.83	\$9,102.00	\$8,188.83
finance director costs	\$7,135.61	\$7,972.00	\$7,135.61
pipeline survey	\$12,441.00	\$12,441.00	\$24,882.00
fire marshal	\$340.51	\$0.00	\$0.00
Total	\$402,787.02	\$29,515.00	\$40,206.44
total per rod at 14,798 rods	\$27.22	\$1.99	\$2.72

The Examiners note that the conclusions are based on the evidence and arguments put forth in this case and the specifics of this case. The Examiners find that the City was not able to establish certain costs are authorized based on the information and evidence the City provided. The City was unable to specifically define the costs in many instances or directly tie the costs to the regulation of the location of pipelines.

- The City's reliance on the Port of Texas City's \$40 per rod charge is unwarranted—the City's charge of \$40 and \$80 per rod is not cost based as required.**

The Statutes require the charges assessed by cities to be reasonable and the charges cannot exceed the cost of regulating the location of pipelines.¹⁶¹ The rules implementing the Statutes require the charges to be reasonable and cost-based.¹⁶² The City did not base the \$40 and \$80 per rod charge in the 2014 Ordinance on costs. It was based primarily on the fact that the Port of Texas City, a private entity, charges \$40 per rod for the use of its rights-of-way.

Because the Statutes limit the charges to the cost of regulating the location of pipelines, the City must provide evidence of costs to support its charge. The fact that a private entity charges \$40 does not eliminate the requirement limiting the charges to the cost of regulating the location of pipelines. Per the Statutes and Commission rules, the City has the burden to establish the charges are authorized.¹⁶³

Commission rules set forth factors that can be considered when determining reasonableness. While one of the factors is to compare the charge to what other Texas cities charge, none of the factors include a comparison to charges by a private entity.¹⁶⁴ Private entities are distinct from cities which are public entities. Other Texas cities are also subject to the Statutes and Commission rules. Their charges must also be cost based. Private entities are not subject to the Statutes and can charge whatever the market can bear. They are market-based.

¹⁵⁹ See, e.g., Ex. 6 (Exhibit L).

¹⁶⁰ See, e.g., Ex. 13 at 5.

¹⁶¹ TEX. NAT. RES. CODE § 117.102(b)(1) and (c); TEX. UTIL. CODE § 121.2025(b)(1) and (c).

¹⁶² 16 TEX. ADMIN. CODE § 7.6006(b), (c) and (d).

¹⁶³ TEX. NAT. RES. CODE § 117.102(d); TEX. UTIL. CODE § 121.2025(d); 16 TEX. ADMIN. CODE § 7.6006(a).

¹⁶⁴ 16 TEX. ADMIN. CODE § 7.6006(c).

For these reasons, the Examiners find that the fact that the Port of Texas City charges \$40 per rod does not support the City's charges.

2. The Examiners agree with the parties that undisputed costs are authorized.

During the pendency of this case, the City ultimately did provide a cost analysis in an effort to support total costs of \$402,787.02 or \$27.22 per rod. The parties do not dispute the following costs:

- a. Engineering costs of \$8,188.83;
- b. Finance Department costs of \$7,135.61; and
- c. Pipeline survey costs of \$12,441.¹⁶⁵

The engineering costs are for the costs of overseeing and processing requests to construct pipelines along rights-of-way and are supported by the testimony of the person who performs these tasks.¹⁶⁶ The Finance Department costs are costs the Finance Department incurs to invoice the annual charge and update records, and are supported by the testimony of the person who performs and oversees those tasks.¹⁶⁷ Pipeline survey costs are the costs the City incurred to hire an engineering firm to survey the location of the pipelines on City rights-of-way and are supported by the costs the City paid to the engineering firm. The City estimates that it will perform such a survey every two years so the City requested one-half of the cost to support the charge.¹⁶⁸ The Examiners agree with the parties that these costs are allowable.

3. The Examiners find that the disputed costs are not authorized by the Statutes.

The parties dispute whether (1) the type of cost is an allowable cost under the Statutes (i.e. a cost of regulating the location of a pipeline) and (2) there is sufficient evidence to support the cost. The Examiners find that as to each disputed cost, the City has not established that the cost is authorized by the Statutes.

- a. **The Examiners find that the requested Fire Department costs are emergency response costs which are expressly not permissible per Commission rule, and even if allowable, there is insufficient evidence to establish these costs.**

The City requests a total of \$47,940.10 for Fire Department costs and \$340.51 for Fire Marshal costs. The Fire Department costs are broken-down into four categories:

1. Medical Exams;
2. Hazardous Material Training,

¹⁶⁵ See, e.g., Exs. 6 (Exhibit L) and 13 at 5.

¹⁶⁶ Ex. 8 at 4-5.

¹⁶⁷ Ex. 4 at 6.

¹⁶⁸ Exs. 1 at 7

3. Vehicle operating costs, and
4. Annual depreciation of inspection vehicle.¹⁶⁹

As to whether the costs are within the scope of the Statutes, the Examiners find the City has failed to establish that they are. The rules implementing the Statutes expressly state that emergency response costs are not to be included. Accordingly, the Commission has already weighed in on these types of costs and concluded that they are not allowable. The Examiners find that the City presented unauthorized emergency response costs. The Examiners note that in the preamble for the rule, despite there being active comments by municipalities, no municipality commented about, in disagreement or otherwise, the exclusion of these costs.¹⁷⁰ The Examiners address the sufficiency of evidence as to each category separately.

To support the cost of medical exams, David Zacherl, the City's Fire Chief testified that City firefighters are required by law to have an annual physical in part because of the hazardous materials shipped through Appellants' pipelines. He testified that all employees that are expected to respond and control actual or potential leaks or spills of hazardous substances are required to have the exams. He provided a list of five years of medical exam costs averaging \$5,994.78 per year, which is the amount the City is requesting be included.¹⁷¹ In deposition, Chief Zacherl acknowledged that the City's hazardous materials response teams responds to a thirteen-county jurisdiction and also services the large petrochemical industrial complex because it is located within the City's city limits.¹⁷² Appellants argue that the City has to incur the medical exam costs regardless of the presence of pipelines in City rights-of-way due to the other pipelines in the city and other industrial plants. The Examiners find that, even if there were no express exclusion of emergency costs in the rule, the City has not demonstrated these costs are part of the regulation of the location of pipelines since the City would have to incur these costs regardless of any pipelines along rights-of-way. Moreover, even if such costs were allowed, the City seeks 100% of the cost of exams when pipelines along rights-of-way represents a small portion of locations where incidents involving hazardous materials can occur. Pipelines along rights-of-way represent only seven percent of hazardous materials pipelines and the City's emergency response team serves thirteen counties and a large petrochemical complex. The City provided no evidence of the percentage of hazardous materials incidents actually involving pipelines along rights-of-way. In fact, not one instance was provided.

Chief Zacherl provided similar evidence to support the request for hazardous materials training. He testified that city employees who may respond to an incident involving hazardous materials are required by law to have training. He provided a list of training since 2007 averaging \$702.97 per year, which is the amount the City is requesting be included.¹⁷³ For the same reasons discussed as to the medical exams in the paragraph above, the Examiners find the City has not established these costs are authorized.

The City requests 10% of its emergency response operating equipment of \$37,023.67 be included. Chief Zacherl testified that during all emergency response incidents, the responders are

¹⁶⁹ See Ex. 6 (Exhibit L).

¹⁷⁰ 32 Tex. Reg. 1275 (March 9, 2007).

¹⁷¹ Ex. 3 at 5-6; Ex. 15 at 4; Ex. 5, Ex. F.

¹⁷² Ex. 15 at 4.

¹⁷³ Ex. 3 at 5-6; Ex. 15 at 4; Ex. 5, Ex. F.

always also inspecting pipelines as they ride to and from the emergency. They do not get out of the car or make a report. To calculate the amount, Chief Zacherl took 10% of the total time emergency response vehicles took to and from the scene for the years 2012, 2013 and 2014, and multiplied it by a cost-per-hour for each year ranging between \$148-163. He chose 10 percent because he thought it was fair. The Examiners find that the City has not provided sufficient evidence to establish that emergency responders do inspections of underground pipelines at the same time as they perform their emergency response duties. Nor has the City established that 10 percent of all vehicle operating costs are attributable to pipeline inspections. The Examiners find that the City failed to establish this cost is authorized.

The City included an annual depreciation for an inspection vehicle¹⁷⁴ because it is the City's hazardous materials response unit and specifically designed for responding to an incident involving hazardous materials. The Fire Chief allocates 10% of the cost of the vehicle to be included in costs for regulating the location of pipelines.¹⁷⁵ For the reasons discussed above regarding hazardous materials training and exams, the Examiners find the City has not established this cost is authorized.

The evidence presented did not establish what the Fire Marshal costs requested are. It is an insignificant amount of \$340.51. The Examiners could find no explanation or documentation to support this cost.¹⁷⁶ The Examiners find the City has not established this cost is authorized.

b. The Examiners find that the City has not established that requested public works costs are authorized.

The parties dispute whether public works costs are allowable. Appellants maintain that public works costs fall outside the scope of the types of costs contemplated in the Statutes. The City maintains that due to the pipelines in the City's rights-of-way, the costs of many of its duties are increased, including increased public works costs. The city notes there is no express exclusion of public work costs in the Statutes or rules. The Examiners address each public works cost requested by the City separately. The Examiners find that the City was not able to sufficiently attribute public work costs to the regulation of the location of pipelines nor provide sufficient cost data. A main weakness of the City's fee assessment was that it was not cost-based, it was market-based. Consequently, there was no cost tracking or cost analysis before the rate was set and the City had limited cost data that it could provide. A cost analysis was not performed until after this case was initiated. Per the rules and preamble of the Commission rules applicable in this case, it was anticipated that a city would have its cost documentation available when an appeal such as this is filed and be able to provide an explanation of its cost-based data in its response to the appeal within 90 days of the filing of the appeal.¹⁷⁷

¹⁷⁴ Ex. 15 at 28-34.

¹⁷⁵ *Id.*

¹⁷⁶ The Examiners asked the City to provide citations to the record to support each cost in Administrative Law Judge's Letter No. 9 (filed August 30, 2016). In the City of Texas City's Response to Railroad Commission of Texas' Request for Supplemental Information (filed September 30, 2016), the City did not address this cost.

¹⁷⁷ See 16 TEX. ADMIN. CODE §§ 7.6002(d) (90 days to file response) and 7.6004(b) (contents of response to include detailed explanation of cost elements and methodology for calculations); 32 Tex. Reg. 1275, 1278 (March 9, 2007) (in discussing the 90 deadline for a city to file a response to the appeal, the Commission states "This should be sufficient time for a municipality to gather and compile the materials it surely must already have regarding the municipal charge and the pipelines that have been assessed an annual charge in the previous year.").

i. Street and bridge project preparation

Tom Kessler, the Director of the Public Works Department provided the testimony as to public works costs. He testified that One-Calls and job preparation averages two hours with no pipeline conflicts and four hours for jobs encountering a pipeline conflict. He testified that he averages 15 projects per year with conflicts, and 35 without conflicts, such that the total cost to the City averages \$5,378.00 per year.¹⁷⁸ The estimated cost is based on an hourly rate of \$41.37 for Mr. Jeff Pittman, the superintendent over the City's street and bridge department.¹⁷⁹ Mr. Pittman handles the One-Calls. The formula used is:

$$[\text{\#projects per year}] * [\text{\#hours per project}] * 41.37 = \text{cost of project One-Calls/Job Prep.}$$

Additionally, he testified that there is cost for street and bridge drainage projects. He estimates job preparation averages two hours with no pipeline conflicts and four hours for jobs encountering a pipeline conflict. He estimates the City averages 20 projects a year for an average added cost of \$4,799.00 per year.¹⁸⁰ Below is a breakdown:

	road projects	drainage projects	Total for all
with conflicts	\$ 2,482	\$ 3,310	\$ 5,792
without conflicts	\$ 2,896	\$ 1,489	\$ 4,385
Total	\$ 5,378	\$ 4,799	\$ 10,177

The total cost for bridge and street project preparation increased costs put forth by the City is \$10,177.

Mr. Kessler did not provide any actual costs of any projects. In discussing the methodology for arriving at the estimates, he stated:

What that means is the street and bridge department, which they handle in-house drainage and road construction projects, road maintenance projects, that's Jeff Pittman is their superintendent. And that's what he and I think after sitting down and working up – talking our way through our process of how we handle projects, him thinking back of the last 10, 12 years, us looking at how many One-Calls we have annually, that's what we think it takes him to deal with one calls on a daily or almost daily basis.¹⁸¹

From his testimony, it appears that the average estimated time for project preparation and the number of projects was estimated mostly if not all by Mr. Pittman's memory over time.¹⁸²

¹⁷⁸ Ex. 7 at 17.

¹⁷⁹ Ex. 16 at 15; Ex. 16 (Exhibit 2 at 127, 144).

¹⁸⁰ *Id.*

¹⁸¹ Ex. 16 at 55:12-23.

¹⁸² Ex. 7 at 15.

The City argues that these are costs the City incurs due to pipelines in rights-of-way. Appellants argue these are street and bridge construction costs which are activities that the City performs outside its function of regulating the location of pipelines.

The Examiners find that some of the costs do not seem to be attributable to pipelines in rights-of-way. It is the Examiners' understanding that One-Calls have to be made before all excavation projects as part of the process of determining whether there are pipelines involved. These calls need to be made whether pipelines exist where the excavation is to occur or not. So, if there are no pipelines, the calls still have to be made. Thus, the Examiners find that the costs of preparation when there is no pipeline conflict cannot be attributable to the fact of pipelines in rights-of-way. As for the projects that do have conflicts, the City estimates that the preparation of jobs with conflicts add an additional two hours to jobs. Yet, in the City's calculation, the City assesses the entire preparation cost of four hours towards the costs assessed against Appellants. Since two hours is the time it would be if there are no conflicts, and with conflicts it is four hours, only two hours represents potential additional time due to the location of pipelines in rights-of-way. The following is a breakdown of the additional cost related to pipeline conflicts, eliminating the costs not attributable to pipelines in rights-of-way:

conflict projects	road projects	drainage projects	Total for all
first two hours -cost of non-conflict preparation	\$ 1,241	\$ 1,655	\$ 2,896
additional two hours	\$ 1,241	\$ 1,655	\$ 2,896
Total	\$ 2,482	\$ 3,310	\$ 5,792

Based on this, the Examiners (1) eliminate costs associated to non-conflict projects and (2) for projects with conflicts, the Examiners only attribute the additional two hours per project attributable to pipeline conflicts. The remaining costs equal \$2,896.

The Examiners find that road and bridge construction and maintenance is a function cities perform regardless if there are pipelines in rights-of-way. The costs of managing the pipelines and accommodating the location may be within the scope of regulating the location.

Much of the evidence of the costs involved is due to One-Calls. The Texas One-Call Law or Underground Facility Damage Prevention and Safety Act that generally requires all excavators to make One-Calls.¹⁸³ The Examiners note that the City's cost for One-Calls is arguably a safety regulation measure expressly excluded from the costs allowed by Commission rule 16 TEX. ADMIN. CODE § 7.6006(d)(2).

In this case, the Examiners find the City failed to establish these costs are authorized. The nature of the costs is ambiguous and no specific examples or actual costs are provided.

¹⁸³ TEX. UTIL. CODE ch. 251.

ii. Public Works Director salary

The City requests the cost of 20 hours of Mr. Kessler's time. Mr. Kessler testified in direct, and the extent of his direct testimony on this issue is:

As Director of Public Works I spend approximately 20 hours per year dealing with pipeline issues. My hourly rate is approximately \$100.00 per hour, resulting in a cost of \$2,000.00 per year.

Mr. Kessler's estimate is not based on any tracking of time, no specific instances are provided and his estimate does not appear to be limited to pipeline rights-of-way. Pipelines along rights-of-way represents only seven percent of the pipeline within the City's city limits. It is not clear that his discussions of "pipeline issues" is attributable to issues related to the location of pipelines in rights-of-way or what the nature of the cost activity is. The Examiners find that the city failed to establish this cost is authorized.

iii. GIS Analyst

The City requests cost associated to the GIS analyst in the Public Works Department. The testimony offered through direct exam, by Mr. Kessler, in its entirety is:

Our in-house mapping and surveying is done at an hourly rate of \$38.24 per hour. The average time spent over the past five years by our GIS Analyst is 105.3 hours per year, for a total cost of \$4,027.00 per year in added expense.¹⁸⁴

No specific activities or projects were identified. There is no explanation how this is an extra cost associated with pipelines along rights-of way. There was no actual tracking of time. In deposition, Mr. Kessler elaborated that the estimate was based on the number of One-Calls the analyst made over five years and an estimated time per call of 30 minutes.¹⁸⁵ It is unclear what if any relationship these One-Calls have to the One-Call time attributable to Mr. Pittman. It is unclear what the GIS Analyst does or how making One-Calls equates with mapping and surveying. It is also unclear what percentage of the calls are attributable to pipelines on rights-of-way. It is the Examiners' understanding that One-Calls have to be made whether a pipeline exists or not. So, it is not clear which One-Calls are attributable actual pipelines, and which ones are attributable to pipelines on rights-of-way. A list of a description of each One-Call was provided and many do appear to involve rights-of-way because they discuss "street" or "road" repair. However, the extent of actual issues regarding pipelines on rights-of-way is unclear. No specific instances or evidence was provided. The Examiners find the City failed to establish that a portion of the public works GIS Analyst's salary is an authorized cost.

iv. Utilities (department Draftsman)

The city requests costs associated to their utilities office within the Public Works Department. The direct testimony provided, by Mr. Kessler, in its entirety is:

¹⁸⁴ Ex. 7 at 18.

¹⁸⁵ Ex. 16 at 16.

Utilities (Office): Administrative work done by the Utilities Department with respect to resolving pipeline issues and coordinating with pipelines is approximately 48 hours per year, at an average rate of \$29.96 per hour, resulting in a total cost of \$1,438.00.

In deposition, Mr. Kessler elaborated as follows:

There is an employee in the utilities department whose title is draftsman. So that's our utilities department draftsman. He does some GIS work in-house or utilities. He runs some errands. He does our locates. . . . They researched the last year's records, and that is the number of one-calls that came in from pipeline companies asking us to go locate. And that's his time spent locating.¹⁸⁶

No specific activities or costs were provided. No explanation about how this is a documented cost attributable to the location of pipelines in rights-of-way. No documentation of actual costs was provided. The Examiners find that the City failed to establish this cost is authorized.

v. Utilities (pipeline repair)

Mr. Kessler provided testimony regarding pipeline repairs as follows, in its entirety:

Employees of Public Works in the Utilities Department spend an average of 20 total hours per year going out to inspect repairs done by pipelines to ensure that no damage is done to City facilities. This is an average cost of \$717.00.¹⁸⁷

The hourly rate appears to be the average hourly rate of three employees who perform the inspections.¹⁸⁸ No basis for the number of hours was provided. No examples were given or explanation as to how this is an additional cost associated to the location of pipelines in rights-of-way. No documentation of actual hours and inspections was provided. The Examiners find the City failed to establish that this is an authorized cost.

vi. Utilities (leak repair)

The City provided the following testimony, from Mr. Kessler, regarding leak repairs performed by the Utilities Department:

Public Works is tasked with repair any and all leaks of City facilities. The cost of repairing a City waterline doubles when the leak is at or near the location of a pipeline facility on City right-of-ways. I estimate on average a six-man crew spends four hours per event, resulting in an added cost of \$751.00 per event. Public Works experiences at least 15 events per year where we are called out to repair a leak and

¹⁸⁶ Ex. 16 at 60.

¹⁸⁷ Ex. 7 at 18.

¹⁸⁸ Ex. 16 (Exhibit 2 to Ex. 16 at 128).

must spend additional time dealing with pipeline facilities, an average of \$11,265.00 per year.

In deposition, Mr. Kessler elaborated as follows:

Corbin Ballast, our utilities superintendent met with –I mean utilities department head, met with his three superintendents that handled those. They put together an estimate. They feel like they have 15 of them a year. And the typical crew that handles that and how long it typically takes.¹⁸⁹

There is no explanation as to what activities six workmen do for four hours that amounts to added time due to pipelines located along rights-of-way. There is no methodology given for the determination that the repair cost doubles when the location of the repair is near a pipeline. No examples were given and no actual documented instances were provided. The Examiners find the City has failed to establish that this cost is authorized.

vii. Pipeline permit review

The City requests cost of an employee reviewing pipeline applications for repair permits for an average of two repair requests per year, each review taking an estimated one hour, for a total of \$58.00.¹⁹⁰ Appellants argue that this cost be assessed as part of the cost of the permit. No actual documented instances were provided. There is no explanation as to why the requirement and approval of repair permits is part of the cost of regulating the location of pipelines on rights-of-way. The Examiners find the City has failed to establish that this cost is authorized.

viii. Construction services locates

Mr. Kessler testified about costs spent for what he terms “Construction Services locates.” Regarding this requested cost, Mr. Kessler testified as follows:

Public Works must spend additional time before construction projects to determine ownership of pipelines at a project site. Approximately 1.5 hours is spent per event, Public Works encounters an average of 101 events per year. The total average cost is \$7,933.00.¹⁹¹

Per Mr. Kessler in deposition, the superintendent over the Construction Services department compiles a list of specific projects in which “he’s actually dealt with the pipeline companies.” He compiled a list of approximately seven months in 2015, and Mr. Kessler extrapolated the remaining months totaling an average 101 events per year.¹⁹² While specific instances were provided, the time estimate was not based on documented time but on memory. There was no substantive explanation of what the added activities are and how they are incurred due to the location of pipelines on rights-of-way. The scope of activity associated with the costs is vague and

¹⁸⁹ Ex. 16 at 16-17; Ex. 16 (Exhibit 2 of Ex. 16 at 129 and 151).

¹⁹⁰ Ex. 7 at 18.

¹⁹¹ Ex. 7 at 18.

¹⁹² Ex. 16 at 17-18 (Exhibit 2 to Ex. 16 at 129, 148-50, 212).

unspecific. No actual costs were provided, only estimates. The Examiners find the City failed to establish these costs are authorized.

ix. Contracted engineering

The City requests to include \$48,700 per year for contracted engineering. The evidence provided includes:

1. The testimony of Mr. Kessler;¹⁹³
2. A chart with an estimate of "Level of Effort for Pipeline Coordination,"¹⁹⁴ and
3. Handwritten notes of Mr. Kessler.¹⁹⁵

Per Mr. Kessler's testimony, the City contracts with ARKK, an engineering firm, for larger projects. He estimates that "ARKK performs an average of four (4) projects per year involving pipelines (two utility projects and two road/drainage projects)."¹⁹⁶ He met with representatives of ARKK and discussed with them "what it takes for them to deal with pipeline issues" on the projects.¹⁹⁷ ARKK provided Mr. Kessler a chart about what it believes the average additional costs per project to be because of "pipeline issues."¹⁹⁸ A copy of the information contained in the chart verbatim follows:

¹⁹³ Ex. 7 at 19; Ex. 16 at 18.

¹⁹⁴ Ex. 16 (Exhibit 4 of Ex. 16 at 94).

¹⁹⁵ Ex. 16 (Exhibit 2 of Ex. 16 at 129).

¹⁹⁶ Ex. 7 at 19.

¹⁹⁷ Ex. 16 at 18.

¹⁹⁸ *Id.*

Level of Effort for Pipeline Coordination						
HOURLY RATE	Project Manager: \$160.00	Senior Designer: \$125.00	Project Engineer: \$110.00	CADD Operator: \$110.00	Project Inspector: \$90.00	
TASK						TOTAL
Survey Phase						
Surveying and Pipeline Coordination						\$1,000.00
Geotechnical Phase						
Geotechnical Investigation and Boring Coordination						\$500.00
Design Phase						
Site Reconnaissance & Gather Data	1	4	4			\$1,100.00
Contact & Correspond with Pipelines to obtain Drawings	2		4	4		\$1,200.00
Obtain data from Pipeline Company & follow-up	1		4			\$600.00
Incorporate Pipeline Data into Plan Drawings	1		2	2		\$600.00
Prepare Preliminary Design	2	4		4		\$1,260.00
Send Preliminary Drawings to pipeline company		1	2	2		\$565.00
Incorporate Special Notes & Comments & Finalize Drawings	2	2	2	8		\$1,670.00
Bid & Construction Phase						
Pre-Bid Conference	1		1		1	\$360.00
Pre-Construction Conference	1		1		1	\$360.00
Continue coordination with pipeline companies during Construction	4		8		16	\$2,960.00
					TOTAL FEE	\$12,175.00

The descriptions of activities are non-specific and generally between two and ten words. It is unclear that "pipeline issues" is limited to the types of pipelines in this case or that the issues are limited to along rights-of-way. The scope of activities is ambiguous.

Elaborating on the scope of costs, Mr. Kessler testified in deposition as follows:

Q: And these ARKK's costs, these are additional costs because it's near a pipeline?

A: It's additional costs because of the vast network of pipelines in the city. Every project you have – there are certain costs associated with any kind of civil work, whether there's actually a pipeline there or not, you've still got costs involved because they're – and there generally are, but there are costs

involved because of time spent looking for pipelines and trying to – and if there’s any doubt, contacting pipeline companies.

So, but, yes, this is what he feels on average they spend dealing with pipeline issues when they put together plans and specifications and such for our projects.

Mr. Kessler indicates that there are costs requested when no pipelines are involved. His reference to the vast network of pipelines in the city and his use of the phrase “what he feels on average they spend dealing with pipeline issues” seems overly broad and lacks precision or sound methodology.

Mr. Kessler’s handwritten notes show the calculation of his estimated four projects per year at an estimated added cost of \$12,175 totals \$48,700—the amount requested by the City.¹⁹⁹

Even though the testimony was that the City averages four projects with these additional costs, not one instance was provided or historical years of how many projects per year and a description of what the project was. No known future projects were presented with estimated actual costs. The Examiners find that the City has not established these costs are authorized.

x. City project managers

The City requests to include \$6,447 for public works project manager time. The City provides:

1. Testimony of Mr. Kessler;²⁰⁰
2. A list of projects and estimated hours on pipeline inspections for that project; and
3. Mr. Kessler’s handwritten notes.

In direct pre-filed testimony, Mr. Kessler testimony in full on this issue is:

City Project Managers are tasked with inspecting all pipeline repairs that take place on City rights of way. City Project Managers have spent approximately 176 hours in 2015 alone on work related to pipelines. The average rate for each of the three (3) project managers is \$36.63 per hour. This year the cost incurred for work done by the City Project Managers relating to pipelines is \$6,447.00.

While Mr. Kessler begins by stating these project managers are tasked with pipeline repairs on rights-of-way, by describing the work as work “related to pipelines” it is unclear what the scope of this is and that it is limited to the types of pipelines described in the Statutes and limited to City rights-of-way. The City again provides estimates of hours without identifying the tasks or providing underlying information and provides very general conclusory information. Additionally, the list of projects provided do not have information about pipeline inspections, and in fact describe other activities. Below are the projects as identified:

¹⁹⁹ Ex. 16 (Exhibit 2 of Ex. 16 at 129).

²⁰⁰ Ex. 7 at 19.

- October 2010 – 9th Ave Paving @ Bay St. - storm sewer installation - 16 hrs.
- February 2013 - Bay St. Force Main @ Lift Station - force main installation - 32 hrs.
- June 2013 - Century Blvd. @ GCWA Canal - waterline installation - 40 hrs.
- June 2015- 23rd St@ Loop 197 N. sanitary sewer installation - 40 hrs.
- Future November 2015 - Seaside Lane@ Bay St- asphalt transition - 24 hrs.
- Future November 2015 - 20th Ave@ Bay St - asphalt transition - 24 hrs.
- Future December 2015 - 14th Ave@ Bay St- asphalt transition - 24 hrs.
- Future December 20 15 - 16th Ave@ Bay St - asphalt transition - 24 hrs.
- Future February 2016 - 15th Ave Ditch outfall @ Bay St - drainage improvements - 24 hrs.²⁰¹

All the projects identify activities other than pipeline repair. It is unclear that a pipeline repair was needed, what caused it and that the project managers were at the project for the sole purpose of inspecting a pipeline repair, or which hours are attributable to regulation of the location of pipelines and why. Additionally, while Mr. Kessler testifies that the project managers “have spent approximately 176 hours in 2015 alone”, the list shows that four of the five 2015 projects were identified as “Future” projects dated after August 2015 and Mr. Kessler’s pre-filed testimony was verified by Mr. Kessler on August 31, 2015.²⁰² Moreover, the estimated project hours for 2015 on this list total 136 hours, not 176.

Mr. Kessler’s notes show the calculation of 176 hours estimated for 2015 multiplied by the average hourly rate of the three project managers of \$36.63, which equals the \$6,447 requested by the City for this cost.

As to whether the costs of project managers overseeing public work projects involving pipelines is within the scope of the statute, the Examiners find the City has not established these costs are authorized.

xi. Delays on street and bridge road and drainage projects

The City asks to include costs of \$13,774 for delay costs associated with street and bridge road projects. The City requests to include costs of \$5,383.60 for street and bridge drainage projects. The City offers the following evidence:

1. Testimony of Mr. Kessler;²⁰³
2. A sheet showing an hourly rate for Public Work equipment, dated February 1, 2015;²⁰⁴ and
3. Mr. Kessler’s handwritten notes.²⁰⁵

Mr. Kessler testifies that there are approximately 5 road projects, involving pipeline conflicts, that result in an average delay of 8 hours for a crew of six, costing \$344.36 per hour for labor and equipment. Multiplying the five projects times the 8-hour delay per project times the

²⁰¹ Ex. 16 (Deposition Exhibit 4 at 000095-96).

²⁰² Ex. 7 at 21.

²⁰³ Exs. 7 at 19-20; 16 at 75-76 and Exhibit 2 of Ex. 16 at 000130-132, 000188-190, 000212).

²⁰⁴ Ex. 16 (Ex. 2 of Ex. 16 at 188-190).

²⁰⁵ Ex. 16 (Ex. 2 of Ex. 16 at 130-131).

\$344.36, Mr. Kessler estimates an annual cost for these delays to be \$13,774, which is the amount the City is requesting for road project delays.²⁰⁶

Mr. Kessler provides testimony and his notes estimating there are approximately 10 drainage projects, involving pipeline conflicts, that result in an average delay of 2 hours for a crew of five, costing \$269.18 per hour for labor and equipment. Multiplying the 10 projects times the 2-hour delay per project times the \$269.18, Mr. Kessler estimates an annual cost for these delays to be \$13,774, which is the amount the City is requesting for road project delays.²⁰⁷

Mr. Kessler testifies that he and Mr. Pitman determined the estimates:

just based on what we think annually the amount of time, the number of projects that he has encountered these conflicts. It's just based on —because we don't write it down. It's just based on what we think.²⁰⁸

No specific or actual example projects or costs were provided. The Examiners find that the City has failed to establish that the requested costs are authorized.

xii. Pipeline relocation

The City request that costs of \$200,000 be included for pipeline relocation. The evidence submitted was the testimony of Mr. Kessler. He testified that based on his experience, he estimates that the Public Works department encounters an average of 3-4 lines each year that need to be relocated to do necessary repair or maintenance. The City would like to be able to complete 1-2 per year. He estimates the relocation of a single eight-inch pipeline would cost \$200,000, which is the amount that the City is requesting. Mr. Kessler testifies that the City typically does not currently relocate pipelines because it is cost prohibitive.²⁰⁹ Mr. Kessler acknowledged he did not have any documentation to support his estimate of \$200,000 and testified in deposition that it was “based on past experience talking with some people in the pipeline industry. That’s it.”²¹⁰

As to the whether these costs are within the scope of the Statutes, the Examiners find that they are not based on the language in the Statutes that specifically discuss the cost of relocations in terms of being borne by the owner/operator of the relocated pipe or the City depending on which party has a superior right. Specifically, the Statutes state:

(f) This section may not be construed to prevent a municipality from: . . .

(2) requiring the owner or operator of a gas pipeline facility to relocate the pipeline facility, at the owner's or operator's expense, to permit the construction, maintenance, modification, or alteration of a municipal facility.

²⁰⁶ Ex. 7 at 19.

²⁰⁷ Ex. 7 at 19-20; Ex. 16 at 130-131)

²⁰⁸ Ex. 16.

²⁰⁹ Ex. 7 at 13.

²¹⁰ Ex. 16 at 10.

(g) Notwithstanding Subsection (f)(2), the municipality shall pay the cost of relocating a gas pipeline facility if the pipeline facility is authorized by a property right that has priority over the municipality's right to use the public way for the municipal facility.²¹¹

Again, the City provided no supporting documentation to substantiate the costs or enable the Examiners to substantiate and evaluate whether the costs are allowable. No specific past or future projects were specified identifying specific costs or estimates. The City did not state it was committed to any particular relocation and has not historically done them. The Examiners find that the City did not establish that the costs authorized.

xiii. Two capital projects

The City requests to include cost of \$10,419.40 for capital projects amortized over 30 years. The evidence presented included:

1. The testimony of Tom Kessler;
2. Mr. Kessler's handwritten notes;
3. A list of rates used to estimate the cost of equipment usage; and
4. A chart of calculated hourly rates for employees who worked on the capital projects.

There are two capital projects that the City wants to recoup costs from: (1) widening of a drainage ditch and (2) a concrete drainage outfall.

a) The widening of a drainage ditch

The first project was located along a section of 31st street. There were drainage issues and the City needed to widen the ditch at that location. On the west bank of the ditch, there was a major pipeline corridor. On the east bank, there were three houses. Because the cost of relocating the pipelines was probative, the City chose to buy and demolish the three houses to widen the ditch instead of relocating the pipelines.²¹² The Examiners find that this cost is outside the scope of allowable costs in the Statutes. The Statutes allow the City to recover relocation costs from the specific pipeline involved in the relocation, except the Statutes require the City to pay for relocation costs if the pipeline facility involved has a property right with priority over the City's right.²¹³ Because relocation costs are discussed separately than the provision authorizing the charge at issue, the Examiners believe that relocation charges were not intended to be included. The Statutes indicate that relocation costs are to be borne to either the pipelines involved or the City, depending on who has the superior property right. In this instance the City chose not to relocate pipes, and instead chose to buy and demolish houses.

As to the sufficiency of evidence supporting the cost amount, Mr. Kessler testified that the finance director looked at records of what the three homes cost the City. For the estimated cost of labor and equipment, Mr. Kessler testified that the City's construction superintendent researched

²¹¹ TEX. NAT. RES. CODE § 117.102(f) and (g) and TEX. UTIL. CODE § 121.2025(f) and (g).

²¹² Ex. 7 at 11-12.

²¹³ TEX. NAT. RES. CODE § 117.102(f) and (g) and TEX. UTIL. CODE § 121.2025(f) and (g).

his notes and found his daily work sheets. From that, he and Mr. Kessler assembled a list of the men that were assigned the work and calculated an hourly rate based on their salaries and benefits. For the list of hourly equipment rates, Mr. Kessler testified that the project manager supervisor made the list based on means catalogues, local rental equipment rates and FEMA rates.²¹⁴ While there was testimony that documented actual costs were used, the underlying documentation was not provided. While there was testimony that work records were used to support labor costs, they were not provided. While there was testimony that documentation was used to arrive at the equipment rates utilized in estimating equipment costs for this project, it was not provided. The Examiners are left with little more than Mr. Kessler's testimony to support the costs. Additionally, Mr. Kessler's testimony was general and did not provide specifics, such as the work performed by the employees. The Examiners believe a more meaningful review is intended by the Statutes.

b) The concrete drainage outfall

The second project was located at Bay Street and 3rd Avenue. According to the City, the presence of pipelines had prohibited maintenance and was causing the sides of the drainage ditch to fall in, resulting in drainage blockage. To repair this, the City had to pave a concrete slope for the ditch to maintain its form. Mr. Kessler testified that the total costs was \$95,236.²¹⁵ The Examiners find that this cost is outside the scope of allowable costs in the Statutes. The Statutes allow the City to recover repair costs from the specific pipeline involved in the repair.²¹⁶ Because repair costs are discussed separately than the provision authorizing the charge at issue, the Examiners believe that repair charges were not intended to be included. The Statutes indicate that repair costs are to be borne to the pipelines involved.

As to the sufficiency of evidence supporting the cost amount, Mr. Kessler testified that the cost of labor was approximately \$38,956, the cost of equipment was \$35,280, and the cost of materials was \$21,000.²¹⁷ Mr. Kessler provided his handwritten breakdown of costs showing number of hours worked, three categories of workers utilized, the type of equipment used and the number of hours each equipment type was used, and identifies the materials used. He also provided the same equipment rate list and employee hourly cost chart. He also provided a list of the dates worked and identified the type of workers utilized on that date. The first page of the list has "from Glenn" in a handwritten note indicating that a person named Glenn created the list. The underlying documentation supporting the dates and hours worked was not provided. While there was testimony that documentation was used to arrive at the equipment rates utilized in estimating equipment costs for this project, it was not provided. Mr. Kessler's testimony was general and did not provide specifics. The Examiners believe a more meaningful review is intended by the Statutes. The Examiners find the City failed to establish that this cost is authorized.

xiv. Cost to cut and plug abandoned pipelines

The City requests costs associated with cutting and plugging abandoned pipelines of \$4,402. The City's evidence included the testimony of Mr. Kessler and his handwritten notes. No underlying documentation made the basis of Mr. Kessler's testimony and notes was provided. Mr.

²¹⁴ Ex. 16 at 38.

²¹⁵ Ex. 7 at 12.

²¹⁶ TEX. NAT. RES. CODE § 117.102(b)(2) and TEX. UTIL. CODE § 121.2025(b)(2).

²¹⁷ Ex. 7 at 12.

Kessler states that there were six projects done over two years, and estimates a cost of \$3,402 per job.²¹⁸ The types of costs involved are not specifically listed in the Statutes, such as “construction costs.” The absence of these types of costs suggests they were not contemplated to be included.

As to the sufficiency of the evidence of the cost, there is little more than the testimony of Mr. Kessler and unsupported handwritten notes of costs. The testimony does not provide any of the underlying cost documentation to support the testimony and notes. Mr. Kessler provides an estimated cost for cutting and abandoning a pipeline and uses that single estimate for the six pipelines discussed. The Examiners find that plugging (and removing) a pipeline is also arguably analogous to relocating a pipeline, which is addressed in another part of the Statutes, as discussed above. The Examiners find that the City did not establish that these costs are authorized.

- 4. The Examiners find that remaining one-half of the pipeline survey cost is authorized and supported, comparable to the other one-half, which the parties do not dispute.**

The Examiners recommend allowing the entire cost of the pipeline survey that was performed for the City to be included as an authorized cost. Both parties agree that it is an allowable cost. The City requested only half be included because it allocated the cost over two years in anticipation of performing these surveys “at least every two years.”²¹⁹ Based on the evidence in this case, the Examiners determine it is unnecessary to reduce an allowable cost based on speculation of how frequently a survey will need to be performed. There is much evidence in the record that the City has struggled to manage identification of the proper owners and locations of pipelines in such a vast and dynamic network. In this PFD, there are determinations that disputed costs are not allowable based on speculation and unsupported estimations. The second half of the survey costs are actual allowable documented costs that the City incurred approximately the same year of the charges. The Examiners find they are allowable, supported and should be included. Thus, the Examiners recommend \$24,882 be allowed as pipeline survey costs instead of \$12,441, the amount initially sought by the City.

D. The Examiners find that a charge of \$2.72 per rod is reasonable.

In addition to the charges being limited to no more than the cost of regulating the location of pipelines, the charge must be reasonable.²²⁰ Per Commission rule, the following factors may be considered when determining reasonableness:

- (1) whether the charges assessed by the city against pipeline facilities are commensurate with charges assessed for other uses of public right-of-way in the city, other than by franchised public utilities;
- (2) whether the charges assessed by the city are commensurate with charges assessed against pipeline facilities in public right-of-way by other cities in Texas; and

²¹⁸ Exs. 7 at 7; 16 (Exhibit 2 at 000125-126).

²¹⁹ See Ex. 2 at 4.

²²⁰ TEX. NAT. RES. CODE § 117.102(b)(1), TEX. UTIL. CODE § 121.2025(b)(1), and 16 TEX. ADMIN. CODE § 7.6006(b) and (c).

(3) whether total costs of regulating pipeline facilities within the city are fairly allocated among all pipeline facilities, including whether the exclusion of any pipelines from the charges is reasonable.²²¹

There is evidence in the record as to how much other Texas cities charge for pipelines in rights-of-way, and it varies. Some cities charge a set amount and others charge by the foot or rod. The Examiners determine that the charge of \$2.72 per rod is reasonable and within the realm of what other cities charge.

As to whether all pipelines were charged, the evidence is that pipelines that run perpendicular to the rights-of-way were not charged. Only pipelines running along the rights-of-way were charged. Appellants do not dispute this distinction and the Examiners find this distinction reasonable. There is little to no information about what the City charges other types of pipelines for the use of City rights-of-way. The Examiners have insufficient evidence to give this factor weight.

The evidence presented shows the City can only support authorized costs of \$2.72 per rod, that is the upper limit the City can charge.

VI. Conclusion, Proposed Findings of Fact and Proposed Conclusions of Law

Based on the record in this case and evidence presented, the Examiners recommend that the Commission find that:

1. 2010-2013 Appellants' appeal of the 2010-2013 assessment is denied and dismissed because those appellants did not establish that they filed their appeals within a year of first receiving an invoice or other written notice; and
2. Regarding the appeal of the 2014 assessments, the City's assessment was in part unauthorized because it was based on unallowable and unsubstantiated costs.

The Examiners further recommend that the Commission order that the City's 2014 assessment be reduced to \$2.72 per rod based on the City establishing total authorized costs of \$40,206.44 and adopt the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In 2001, the City passed City Ordinance 01-55 (the "2001 Ordinance"). From 2001-2013, the 2001 Ordinance provided for an annual fee of 7.50 per rod for pipelines running along City rights-of-way. Prior to the 2001 Ordinance, the City charged an annual fee of \$1.99 per rod.
2. In the 2013-2014 timeframe, the 2001 Ordinance was replaced by City Ordinance 13-23 ("the 2014 Ordinance"), which increased the annual charge to \$40 per rod for pipelines

²²¹ 16 TEX. ADMIN. CODE § 7.6006(c).

- less than 24 inches in diameter and \$80 per rod for pipelines greater than 24 inches in diameter to be charged starting in 2014 through present.
3. Prior to 2014, City informed pipelines of the annual charge and some paid while others did not. The City had a practice of writing the annual charge on the permits when the permits were issued.
 4. Because the City was not receiving all payments, it began issuing invoices. The first invoice it issued was in September 2014, and the invoice included assessments for years 2010-14, less the amounts the permittee had already paid.
 5. The 2010-2013 assessments were based on \$7.50 per rod per the 2001 Ordinance.
 6. The 2014 assessments were based on \$40 or \$80 per rod, depending on the diameter of the pipeline, per the 2014 Ordinance.
 7. On December 22, 2014, the first appeal in this case was filed by nine of the twelve appellants in this case claiming the 2010-2014 assessments were unauthorized.
 8. Three other appeals were filed and this case was consolidated with the following twelve appellants ("Appellants") in January 2015:
 - a. Houston Pipe Line Company LP,
 - b. Enterprise Products Operating LLC,
 - c. Enterprise GC LLC,
 - d. HSC Pipeline Partnership, LLC,
 - e. Enterprise Texas Pipeline LLC,
 - f. Enterprise TE Products Pipeline Company LLC,
 - g. Flint Hills Resources Port Arthur, LLC,
 - h. Valero Refining-Texas, LP,
 - i. Buckeye Development & Logistics, LLC,
 - j. Exxonmobil Pipeline Company,
 - k. Exxonmobil Oil Corporation, and
 - l. Kinder Morgan Tejas Pipeline LLC.
 9. All Appellants except Kinder Morgan Tejas Pipeline LLC appeal the City's 2010-2013 charges of \$7.50 per rod. These appellants did not provide sufficient evidence that the September 2014 invoice was the first written notice they received of the assessments for years 2010-13. There is insufficient evidence in the record to establish when these appellants first received written notice of the 2010-2013 assessments.
 10. Notice of hearing of over 10 days was provided to the City and Appellants.
 11. The City and all Appellants appeared at the hearing and presented evidence.
 12. The number of total rods along the City's rights-of-way is 14,798.

13. Total authorized costs that do not exceed the cost of regulating the location of pipelines of \$40,206.44, or \$2.72 per rod.
 - a. The City established authorized engineering costs of \$81,88.83.
 - b. The City established authorized Finance Department costs of \$7,135.61.
 - c. The City established authorized pipeline survey costs of \$24,882.

The engineering costs are for the costs of overseeing and processing requests to construct pipelines along rights-of-way and are supported by the testimony of the person who performs these tasks. The Finance Department costs are costs the Finance Department incurs to invoice the annual charge and update records, and are supported by the testimony of the person who performs and oversees those tasks. Pipeline survey costs are the costs the City incurred to hire an engineering firm to survey the location of the pipelines on City rights-of-way and are supported by the costs the City paid to the engineering firm.

14. Total charges of \$40,206.44, \$2.72 per rod, is reasonable. This amount is in accordance with what other municipalities charge under TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025.
15. The City's practice of not including pipelines perpendicular to the rights-of-way is reasonable.
16. Total charges of \$40,206.44, \$2.72 per rod, is reasonable and authorized by TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025.
17. The City did not establish that any additional amount was authorized by TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025.

CONCLUSIONS OF LAW

1. Proper notice was issued in accordance with all applicable statutes and regulatory codes. *See, e.g.*, TEX. GOV'T CODE §§ 2001.051 and .052 and 16 TEX. ADMIN. CODE § 1.45.
2. The Commission has jurisdiction of this matter pursuant to TEX. NAT. RES. CODE § 117.102 and TEX. UTIL. CODE § 121.2025.
3. The appeals of the City's 2010-2013 assessments should be denied and dismissed for lack of evidence that the appellants of those charges filed their appeals within a year of first receiving written notice of those charges as required by 16 TEX. ADMIN. CODE § 7.6002(a).
4. A charge in 2014 of \$2.72 is reasonable. TEX. NAT. RES. CODE § 117.102(b)(1) and TEX. UTIL. CODE § 121.2025(b)(1).

5. A charge in 2014 of \$2.72 is authorized. TEX. NAT. RES. CODE § 117.102(b)(1) and TEX. UTIL. CODE § 121.2025(b)(1).
6. The City's 2014 annual assessment to Appellants should be reduced to \$2.72 per rod.

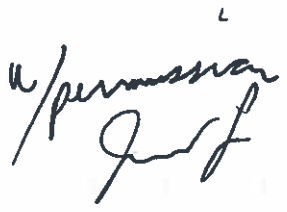
EXAMINERS' RECOMMENDATION

Based on the record evidence, the Examiners recommend that the Commission deny and dismiss the appeals of the City's 2010-2013 annual assessments and reduce the City's 2014 assessments which are being appealed to \$2.72 per rod.

Respectfully,


Jennifer Cook
Administrative Law Judge


Rose Ruiz
Technical Examiner


a/permission
Jurf