

# NORTON ROSE FULBRIGHT

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<b>To</b>	<b>Bridget C. Bohac</b>	<b>Tel</b>	<b>512-239-3300</b>
	TCEQ - Office of the Chief Clerk, MC 105		
<b>Fax</b>	<b>512-239-3311</b>		
<b>Email</b>		<b>Your ref</b>	

<b>From</b>	Thomas A. Countryman, Senior Counsel 2244	<b>Date</b>	June 24, 2014
<b>Direct line</b>	+1 210 270 7121	<b>Our ref</b>	07854 10908967
<b>Email</b>	tom.countryman@nortonrosefulbright.com <b>TENASKA GATEWAY GENERATION STATION</b> Appeal of Purported Negative Use Determination		
<b>Re</b>	Use Determination Application No. 07-11914 <b>2008-0830-MIS-U</b>		
<b>Number of pages (including this one)</b>	<b>33</b>		<b>Originals Will Follow By Certified Mail</b>

Please see attached. Thank you.

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June 24, 2014

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United States

## VIA FAX AND CMRRR

Bridget C. Bohac  
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Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087

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Senior Counsel  
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Re: Use Determination Application No. 07-11914 ("Application")  
TCEQ Docket No. \_\_\_\_\_  
Tracking Number: GATEWAY-2008-1  
Tenaska Gateway Generation Station  
**Appeal of Purported Negative Use Determination**

Dear Ms. Bohac:

We represent Tenaska Gateway Partners, Ltd. ("Tenaska"), the applicant in the above-referenced matter. Our client is in receipt of the June 5, 2014 letter (the "Letter," copy attached for ease of reference) from David Brymer in which he purports to issue a negative use determination (presumably for TCEQ's Executive Director ("ED")) for the three heat recovery steam generators ("HRSGs") included in the subject Application, as supplemented.

The Letter was not signed by the ED, nor was it served with any document signed by the ED. Nevertheless, pursuant to 30 TEX. ADMIN. CODE § 17.25(a)(2)(A), Tenaska files this appeal of the Letter and its purported negative use determination and does so while reserving and without waiving its right to contest that the Executive Director did not issue or sign the Letter himself, as required.

The information required under 30 TEX. ADMIN. CODE § 17.25(b) is as follows:

- (1) **provide the name, address, and daytime telephone number of the person requesting and who files the appeal:**

The undersigned is filing this appeal on behalf of Tenaska. All correspondence concerning this appeal should be sent to the following:

Thomas A. Countryman  
Fulbright & Jaworski L.L.P.  
300 Convent Street, Suite 2100  
San Antonio, Texas 78205-3792  
Telephone: (210) 270-7144

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Fax: (210) 270-7205  
Email: [tom.countryman@nortonrosefulbright.com](mailto:tom.countryman@nortonrosefulbright.com)

- (2) **give the name and address of the entity to which the use determination was issued, and of the Chief Appraiser of the pertinent appraisal district:**

Tenaska Gateway Partners, Ltd.  
c/o Tenaska, Inc.  
David D. Johnson  
14302 FNB Parkway  
Omaha, NE 68154-5212

(NOTE: this is a new mailing address.)

Rusk County Appraisal District  
Terry W. Decker, RPA, RTA, Chief Appraiser  
P.O. Box 7  
Henderson, Texas 75653-0007

- (3) **provide the use determination application number for the application for which the use determination was issued:**

Use Determination Application 07-11914

- (4) **request commission consideration of the use determination/description of what is being appealed:**

This letter is a formal request to the Commission for consideration of Tenaska's appeal of the purported negative use determination described in the Letter.

- (5) **explain the basis for the appeal.**

Tenaska incorporates and reurges herein for all purposes by reference its previously filed original Application for Positive Use Determination, as supplemented by its First and Second Supplemental Applications (collectively, the "Supplemented Application"). In 2008, Tenaska applied for a pollution control positive use determination for an enhanced steam turbine combined with three HRSGs ("HRSGs") at its Gateway facility ("Gateway"). Gateway is a natural gas-fueled, combined-cycle electric generating station. After first granting Tenaska's HRSGs a 100% positive use determination, on appeal by certain taxing authorities and after inordinate delay, the ED's staff ("Staff") reversed itself and entered a negative use determination for the HRSGs. This determination itself was reversed and remanded by the TCEQ Commissioners based upon, *inter alia*, a complete failure by Staff to explain or support their simple, flat denial of any positive use determination in conformity with TEXAS TAX CODE §11.31, the applicable authorizing legislation. Now, in its Letter, Staff once more has used a more or less "form" response to issue a negative use determination for Tenaska's HRSGs (and

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all other HRSG Owner-Applicants' Applications for positive use determinations) with very little real additional analysis or justification beyond their own consistent "say-so," and completely without just cause.

So, this controversy has merely come full circle, and Tenaska has nothing to show for its past efforts, despite the Commission's prior remand. Engaged in what now seems an obvious "war of attrition," Tenaska has been forced to waste tens of thousands of dollars in costs and hundreds of hours of work just to get back to where it started, contrary to the Commissioners' directives. And as before, Staff's negative use determination is both insufficiently supported and patently wrong for, among others, the following reasons.

**1. Regulatory Support and Requirements**

First, relative to regulatory support for the Application concerning Tenaska's HRSGs, TEXAS TAX CODE §11.31 eliminates any need for any regulatory citation in support of the Application. See TEX. TAX CODE §11.31(k), (l) and (m). Nevertheless, Tenaska's HRSGs in fact do meet or exceed a variety of rules and regulations issued by environmental agencies to control or reduce air pollution. See, e.g. and without limitation, 30 TEX. ADMIN. CODE § 117.3010, § 101.20, § 101.21, § 101.506(c), §106.512, § 116.10(1), § 116.111(a)(2)(C), § 116.160(c)(1)(A); 70 FED. REG. 25162; 40 CFR §60.44Da, §50.11, §50.17, §50.6, §50.8, §52.21(b)(12); and Texas House Bill 788 (2013) and various EPA regulations concerning greenhouse gases. See, e.g., PSD and Title V Permitting Guidance for Greenhouse Gases, Office of Air Quality Planning and Standards, United States Environmental Protection Agency, March, 2011 (collectively, "Supporting Laws"). Staff's contention to Tenaska that "supporting regulations" must be limited to those "the HRSGs were required to meet," see Letter, p. 2, first full paragraph (emphasis added), impermissibly engrafts an additional condition upon controlling laws and regulations that is at clear odds with TCEQ's statutory boundaries and mandate.

No rule, regulation, proclamation or other action of an agency can contradict or alter the statute giving rise to it. See, e.g., *Public Utilities Commission v. City Public Service Board*, 53 S.W.3d at 312; *Tennessee Gas Pipeline Co. v. Rylander*, 80 S.W.3d at 203. Consequently, the ED's attempt to engraft any additional condition upon the unconditional mandates of TEX. TAX CODE §11.31 – especially any which would effectively nullify or vary any part of it – are simply ineffective and void, and the ED's stated "interpretation" of TEX. TAX CODE §11.31 must be disregarded by the TCEQ Commissioners.

Any requirement by the ED that a HRSG be specifically or uniquely required to satisfy a Supporting Law would not only ignore and effectively and illegally rewrite the Legislature's mandates discussed above, as well as TCEQ's own implementing regulations. It also would ignore and violate formal rulemaking procedures under the Texas Administrative Procedure Act ("APA") by effectively amending 30 TAC §17.4(a). A "rule" is any "state agency statement of general applicability that ... implements, interprets, or prescribes law or policy," including "the amendment or repeal of a prior rule." Tex. Gov't Code §2001.003(6). A state agency can only promulgate new rules

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through formal rulemaking procedures, including prior notice of a proposed new rule and an opportunity for public comment, legislative review, and a formal order adopting it. Tex. Gov't Code §§2001.23; 2001.029; 2001.032-.033. The APA also requires advance notice – which was not provided here – to contain enough information to allow interested persons to determine if they need to participate to protect their own rights. *Texas Workers' Compensation Commission v. Patient Advocates*, 136 S.W.3d 643, 650 (Tex. 2004).

As, if not more, important, Staff has clearly not followed its own reasoning consistently and has, in fact, accepted various Supporting Laws cited by Tenaska when ruling on other HRSG Owners' Applications for positive use determinations. See, e.g., attached Exhibit "A", sample negative use determinations issued nearly simultaneously with Tenaska's, coupled with the subject Applicant's regulatory citations.<sup>1</sup> Staff's failure to accept the same citations relative to Tenaska's supplemented Application is a denial of both equal protection and due process principles and TEXAS TAX CODE §11.31(k), (l) and (m). In further support of this premise, the ED has already determined HRSGs satisfy various Supporting Laws by granting 19 final 100% Positive Use Determinations based thereon, most notably on 40 CFR §60.44Da, also cited by Tenaska. Any rejection at this late date of 40 CFR §60.44Da or any of Tenaska's Supporting Laws which have been previously or concurrently accepted and approved by TCEQ as Supporting Laws would run afoul of equal protection principles and the requirements of uniformity, equality and fairness in approach. See Tex. Tax Code § 11.31(g)(2); Tex. Const. art. VIII, § 1(a); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Treating similar properties disparately is the very definition of arbitrary and capricious action. See, e.g., *Contractors Transp. Corp. v. U.S.*, 537 F.2d 1160, 1162 (4th Cir. 1976); *Brennan v. Gilles & Catting, Inc.*, 504 F.2d 1255, 1264-65 (4th Cir. 1974).

Functionally, Tenaska's HRSGs cause the facility and its components, as applicable, to meet or exceed the requirements of all Supporting Laws. The HRSGs reduce emissions by increasing Gateway's thermal efficiency, as compared to a traditional steam boiler unit, by reducing its fuel needs and hence, simultaneously reducing related emissions, including without limitation, nitrogen oxides (NOx)) for the same power output. In addition, the duct burners inside the HRSGs, as designed, further reduce plant air emissions using additional emissions controls, in addition to the efficiency-based emissions reductions.

## 2. Positive Use Calculations.

HRSGs are eligible for at least some positive use determination because they have been expressly defined by statute and regulation as pollution control equipment. TEX. TAX

<sup>1</sup> For brevity, Tenaska has not attached all the ED's rulings that have accepted one or more of Tenaska's Supporting Laws, but there are a number of others. See, e.g., Application Nos. 13534 (South Texas Electric Cooperative, Inc. – Sam Rayburn Power Plant Expansion); Application #07-12211 (Topaz Power Group, LLC – Nueces Bay Power Plant); Application #07-12210 (Topaz Power Group, LLC – Barney Davis Power Plant); Application #07-11926 (Navasota Wharton Energy Partners, LP – Colorado Bend Facility); Application #07-12268 (Wolf Hollow I, LP – Wolf Hollow Power Plant).

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CODE §11.31(k), (l) and (m)<sup>2</sup> TCEQ has never found compelling evidence that HRSGs do not render pollution control benefits.<sup>3</sup> *Id.* Again, the ED's interpretation of TEXAS TAX CODE §11.31(k), (l) and (m), on its face, is in direct, and impermissible, conflict with the ECL, ERL and the Legislature's fundamental mandates in its governing laws, TEX. TAX CODE §11.31(k), (l) and (m). Once more, the ED, at least inferentially, impermissibly engrafts an additional condition upon the statute which the Legislature clearly did not include or intend and which, in fact, is precisely contrary to the statute: that "partly" in TEX. TAX CODE §11.31(m) can include 0%. Plain English defeats this reasoning. "Partly" means "in some measure or degree: PARTIALLY;" "zero" denotes "the absence of all magnitude or quantity." See, e.g., *Webster's Ninth New Collegiate Dictionary* (Merriam Webster, Inc., Springfield, MA 1987) (emphasis added). No rule, regulation, proclamation or other action of an agency can contradict or alter the statute giving rise to it. See, e.g., *Public Utilities Commission v. City Public Service Board*, 53 S.W.3d at 312; *Tennessee Gas Pipeline Co. v. Rylander*, 80 S.W.3d at 203.

As for the actual calculation of Tenaska's positive use determination ("PUD"), except for the CAP discussed below, for the reasons cited in the Supplemented Application, each of the alternative formulas properly submitted by Tenaska under "Tier 4" reasonably do "present information in the Application for the determination of the proportion of the property that is pollution control." See Letter, p. 2, second full paragraph, third sentence. Tenaska is required to do no more. TEX. TAX CODE §11.31(m) does note the *Executive Director* – not the Applicant – should distinguish the production portion of the §11.31(k)-listed equipment from the pollution control portion. However, neither the controlling statute nor TCEQ's implementing regulation itself actually require a determination of "production" function, especially by the *Applicant*, as a prerequisite to a valid positive use determination based on pollution control or prevention: all that is required is a determination of pollution control or prevention itself. See TEX. TAX CODE §11.31(d), (m)<sup>4</sup>; 30 TAC §17.12(3). Consequently, Tenaska has established its right to a PUD.

Nevertheless, and quite tellingly, Staff wrongly, and *only*, approves the statutory Cost Analysis Procedure ("CAP") applicable to "Tier 3" Applications, presumably because it results in a -2429% use determination. This result only emphasizes the flaws associated with the CAP's application in this situation: the very idea that equipment could be *more* than 100% non-pollution control (much less over 20 times that amount) is pragmatically and logically impossible.

<sup>2</sup> This is completely appropriate. As discussed in the First Supplement at length, see First Supplement, ISSUE 2 Response, ¶2, Gateway's HRSGs both save "input" fuel and reduce "output" air emissions in the form of nitrogen oxide ("NOx"), among other pollutants.

<sup>3</sup> Significantly, TCEQ did not remove HRSGs from the ECL/ERL despite having *had* to reconsider the question, at least, in 2010.

<sup>4</sup> Subsection (g)(3) does provide that Commission rules should "allow for" determinations that distinguish the proportion of property used to control or prevent pollution from that used to produce goods or services, and as illustrated, Tenaska Gateway's alternate Methodology Three does "allow for" such a determination. However, such a determination is not a stated prerequisite to a valid PUD. Accepting, just for the sake of argument, the ED's position that "production plus pollution control" must equal and be limited to 100%, all it would require, hypothetically, to determine a "production factor" would be to deduct the PUD of 38% from 100%.

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Further. Staff's criticism that Tenaska's non-CAP calculations do not distinguish the *proportion of property used to control... prevent or reduce pollution* from that used to produce goods or services," see Letter, p. 2, third full paragraph, second sentence (emphasis added), is not only wrong for reasons cited above; it is completely at odds with Staff's own approach in attempting to impose use of the Tier 3 CAP, see Figure: 30 TAC §17.17(b). The CAP's use of purely economic factors (e.g., costs and revenues) obviously has *nothing* to do with emissions reduction and patently does not measure, reflect or even relate to pollution control, prevention or reduction at all. As a matter of fact, it is far more logical and rational to focus on actual emissions reductions than any mere cost or revenue differences when determining the percentage of pollution control or prevention provided by HRSGs (or any pollution control equipment, for that matter).

In conclusion and summary, it is noteworthy that TCEQ's own letterhead reflects its mandate: "Protecting Texas by Reducing and Preventing Pollution." Staff's "about face" in this and similar cases – solely because of various appraisal district's appeals – indicates a disturbing shift by Staff away from TCEQ's mandate to protect the environment and Staff's highly improper move toward simple tax revenue generation. Staff's current determination is fatally flawed and should be once more remanded (and the Commissioners should provide explicit instructions to Staff on how to determine an appropriate use determination) because, in addition to the foregoing:

- The Executive Director has not lawfully issued a negative use determination, or properly supported it.
- Staff (and the ED to the extent, if any, he authorized the Letter) misunderstands or disregards the nature, function and pollution control benefits of Tenaska's HRSGs.
- The Executive Director has failed to offer a reasoned and timely explanation for: a) finding 0% pollution control for Tenaska's HRSGs; b) rejecting Tenaska's sufficient and reasonable formulas and explanations for why its HRSGs should be awarded a positive use determination; c) disregarding the pollution control percentage(s) voluntarily determined by Tenaska; and d) effectively forcing Tenaska to use the Cost Analysis Procedure ("CAP") intended for use only with "Tier 3" Applications.
- The HRSGs at Gateway satisfy the statutory definition of and requirements for pollution control equipment and are entitled to a 100% or at least a partial positive use determination.
- The Executive Director has acted arbitrarily and capriciously; has treated similar property in conflicting ways despite statutory and constitutional prohibitions to the contrary; and has deprived Tenaska of due process and equal protection.

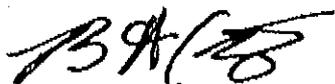
We understand the TCEQ's General Counsel will provide us with a briefing schedule and agenda date now that the issue is joined and this appeal timely filed. We look forward to briefing this matter in full and would greatly appreciate the opportunity to address the Commission in person.

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Per my conversation with Melissa Chao of your office, I understand you will be assigning a TCEQ Docket Number to this appeal upon receipt. Please provide me with notice of that Docket number as soon as it is received. E-mail notice will be fine, if addressed to me at the above email address. Thank you very much for your attention to this matter.

Very truly yours,



Thomas A. Countryman.  
Senior Counsel

With Enclosures as noted

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 5, 2014

Mr. David D. Johnson  
Director of Tax and Finance  
Tenaska, Inc.  
1044 North 115th Street, Suite 400  
Omaha, NE 68154-4446

Re: Notice of Negative Use Determination  
Tenaska Gateway Partners, Ltd.  
Tenaska Gateway Generating Station  
State Highway 315  
Mt. Enterprise (Rusk County)  
Application Number: 07-11914  
Tracking Number: GATEWAY-2008-1

Dear Mr. Johnson:

This letter responds to Tenaska Gateway Partners, Ltd.'s Application for Use Determination for the Tenaska Gateway Generating Station, originally submitted on March 14, 2008 and remanded to the executive director (ED) on December 5, 2012 by the Texas Commission on Environmental Quality (TCEQ) commissioners. Your application seeks a use determination for three Heat Recovery Steam Generators (HRSG) and requested a Tier IV partial use determination.

The ED has completed the review for application #07-11914 and the associated notice of deficiency (NOD) responses and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) Chapter 17. The Negative Use Determination is issued for the following reasons: 1) the ED cannot find that the property is used, constructed, acquired, or installed wholly or partly to meet or exceed any cited laws, rules, or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution; and 2) even if there were an applicable law cited in the application for the subject property, the ED does not find your methods for determining the use determination percentage to be reasonable.

Commission rule at 30 TAC §17.10(d) requires an applicant to cite to a specific law, rule, or regulation that is being met or exceeded by the use, construction, acquisition, or installation of the pollution control property. As specified in 30 TAC §17.4(a) and authorized by Article VIII, § 1-1, of the Texas Constitution, for a property to be eligible for an exemption from ad valorem taxation, all or part of property must be used, constructed, acquired, or installed wholly or partly to meet or exceed rules or

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regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision for the prevention, monitoring, control, or reduction of air, water, or land pollution. Commission rules do not allow an applicant to omit the requirement to cite a specific environmental law even for property that is specified on the list of property in Texas Tax Code §11.31(k).

The ED does not require a citation to a law or rule that mandates the installation of a specific type of equipment. However, the ED does not find that the HRSG is used to meet or exceed any of the environmental laws that were cited in your application. While the application and responses provided numerous rule citations, none were to rules that the HRSGs were required to meet. Therefore, the HRSGs do not meet the applicability requirements of 30 TAC §17.4(a) to be eligible for exemption from ad valorem taxation.

The Tier IV application process, in place in commission rules between February 2008 and December 2010, allowed an applicant to propose a method for calculating a partial use determination. The commission rules allow for determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. If the property is not used wholly for the control of air, water, or land pollution, the applicant must present information in the application for the determination of the proportion of the property that is pollution control. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the responsibility of the ED to review the proposed method and make the final determination.

After careful review of the seven methods for calculating a partial positive use determination included in the applicant's submittals, the ED has determined that all but one of the methods are unacceptable. The six methods proposed by the applicant do not reasonably distinguish the proportion of the HRSG that provides a purported pollution control benefit from the proportion of the HRSG that produces steam that is used in a process or to produce electricity for use or sale. The one method that the ED does find acceptable, the Cost Analysis Procedure (CAP) adopted by the commission, produces a negative number. Therefore, the property is not eligible for a positive use determination.

The following is an explanation of the ED's review of the methodologies presented in your application:

- **Avoided Emissions Approach (36.7%):** This approach is not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. Furthermore, the avoided emission approach does not attribute any value to production. By attributing the entire avoided emissions to the HRSGs, this approach ignores nitrogen oxides (NOx) reductions related to other property for which a positive use determination has been issued.
- **Executive Director's December 3, 2008 Brief (61%):** Subsequent to filing the brief where this methodology is presented, the ED determined that the proposed

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calculation did not accurately calculate an appropriate use determination because the less efficient the equipment, the higher the positive use determination percentage it yielded. This produces an unreasonable result and should not provide the basis for a final determination.

- Fuel Savings (57%): This approach is not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. While reduced operating inputs may result in avoided or reduced emissions, the percentage reduction in operating inputs does not distinguish the production portion of the HRSG from any pollution prevention portion.
- Emissions Decrease over Comparator (38%): The calculation does not distinguish the portion of the property used for pollution control from that used for production. This approach does not attribute any value to production. Furthermore, by attributing the entire avoided emissions to the HRSGs this approach ignores NOx reductions related to other property for which a positive use determination has been issued.
- Avoided Control Equipment (51%): The calculation does not distinguish the portion of the property used for pollution control from that used for production.
- Modified CAP Calculations (71%): Capital Cost New (CCN) includes a steam turbine and water systems. A negative determination was issued for the steam turbine on May 1, 2008. The steam turbine is not a part of this application and its related value cannot be included in CCN. The water systems are also production equipment and should not be included in CCN. Allowing Capital Cost Old (CCO) to be \$0 ignores that HRSGs are alternative production equipment. CCO is the cost of comparable equipment without the pollution control. If the HRSGs produce steam, then comparable equipment that produces steam without pollution control is a boiler. The ED does not find it reasonable to attribute \$0 cost to CCO in the CAP.
- CAP as proposed by the executive director (-2429%): The CAP formula was adopted by the commission to provide a methodology for determinations that distinguishes the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. The fact that the CAP calculated results in a negative number shows that the HRSGs pollution prevention benefit is negated by its ability to produce a product.

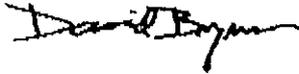
Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at

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(512) 239-6348, by e-mail at [ronald.hatlett@tceq.texas.gov](mailto:ronald.hatlett@tceq.texas.gov), or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,



David Brymer, Director  
Air Quality Division

DB/rh

cc: Chief Appraiser, Rusk County Appraisal District, P.O. Box 7, Henderson, Texas  
75652-0007



# CALPINE CORPORATION

717 TEXAS AVENUE, SUITE 1000  
HOUSTON, TX 77002

NYREG21

June 21, 2013

Via Overnight Delivery

Mr. Ronald Hatlett  
Texas Commission on Environmental Quality  
Tax Relief for Pollution Control Property Program  
Building F, MC-110  
12100 Park 35 Circle  
Austin, TX 78753

Re: Response to Notice of Technical Deficiency  
Brazos Valley Energy, LLC (f/k/a Brazos Valley Energy, LP)  
Brazos Valley Energy Center  
3440 Lockwood Road  
Richmond, TX (Fort Bend County)  
Application Number: 11969  
Tracking Number: DPBRAZOSVALLEY B

Dear Mr. Hatlett:

The information in this Supplemental Use Determination Application ("Supplement") is presented in support, supplementation, and amendment of Brazos Valley Energy Center's ("Brazos Valley") original Use Determination Application No. 11969 ("Application") seeking a Positive Use Determination (and related ad valorem property tax exemption) for Brazos Valley's heat recovery steam generators ("HRSGs"). It is also provided in response to the February 21, 2013 Notice of Technical Deficiency ("NOD") sent to Brazos Valley by the Texas Commission on Environmental Quality ("TCEQ") and in response to TCEQ's March 20, 2013 clarifying correspondence regarding the NOD. Except to the extent specifically modified herein, Brazos Valley expressly incorporates and reurges the Application in its entirety herein. Set forth below is Brazos Valley's response to each issue raised in the NOD.

I.

RESTATEMENT OF ISSUE 1 AND RESPONSE

*Issue 1: Please review the enclosed application to ensure that all information is still current.*

Specific Response to Issue 1

Brazos Valley has reviewed the information contained in its Application submitted in 2008 and by this submission is updating that information where appropriate. Except to the extent modified herein, the information contained in the Application remains current and correct.

## II.

**RESTATEMENT OF ISSUE 2 AND RESPONSE (INCLUDING OBJECTIONS)**

*Issue 2: Specify the subsections of 40 Code of Federal Regulations (CFR) §60 Subparts Da and Db being met as a result of the installation and use of the heat recovery steam generators (HRSG) and explain how the HRSG use causes the facility to meet or exceed these requirements.*

A. **Objections to Issue 2**1. ***TEX. TAX CODE § 11.31(m) and (k) make clear that HRSGs meet or exceed environmental regulations***

Brazos Valley objects to any requirement that it needs to establish its right to the tax exemption. The Texas Legislature expressed its intent that HRSGs be treated as pollution control devices when it amended Section 11.31 of the Tax Code in 2007 to include subsection (k). That subsection requires that TCEQ adopt a list of such devices and mandates that HRSGs be included on that list. *See* TEX. TAX CODE § 11.31(k).

In addition, Section 11.31(m) states:

**(m) Notwithstanding the other provisions of this section, if the facility, device, or method for the control of air, water, or land pollution described in an application for an exemption under this section is a facility, device, or method included on the list adopted under Subsection (k), the executive director of the Texas Commission on Environmental Quality, not later than the 30th day after the date of receipt of the information required by Subsections (c)(2) and (3) and without regard to whether the information required by Subsection (c)(1) has been submitted, shall determine that the facility, device, or method described in the application is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution and shall take the actions that are required by Subsection (d) in the event such a determination is made.**

TEX. TAX CODE § 11.31(m) (emphasis added).

This legislative directive is definitive and unambiguous: the list comprises equipment that the Legislature has conclusively determined meets all criteria to constitute pollution control equipment. Thus, Brazos Valley should not be questioned on regulations or environmental benefit because inclusion of equipment on the list represents a legislative determination that HRSGs meet or exceed an environmental rule and that an environmental benefit exists.

2. ***Regardless, HRSGs provide an important environmental benefit***

The HRSGs at Brazos Valley provide an important environmental benefit and are used to meet or exceed regulatory requirements, as set forth above. It is important to note that contrary to the position taken previously by the TCEQ, no direct "nexus" with the environmental rule

being cited is necessary. Even setting aside Sections 11.31(m) and 11.31(k), the Tax Code only requires that the equipment be "used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations . . . for the prevention, monitoring, control, or reduction of air, water, or land pollution." TEX. TAX CODE §11.31(b). There is nothing in the Tax Code that restricts an applicant from claiming a tax exemption to those instances where the rule specifically requires HRSGs or where the HRSG is the sole method for complying with the rule. There can be no genuine question that the HRSGs were installed and are used to meet or exceed rules and regulations for the prevention, monitoring, control, or reduction of air pollution.

3. *Any determination that HRSGs do not meet or exceed would be unconstitutional*

If the TCEQ were to determine that these regulations are not sufficient under the law, the TCEQ would violate the equal protection principles and the requirements of uniformity, equality and fairness in approach. See TEX. TAX CODE § 11.31(g)(2); TEX. CONST. art. VIII, § 1(a); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). On or about May 1, 2008, the ED also awarded 100% Positive Use Determinations for HRSGs belonging to approximately 20 different applicants, and those 100% Positive Use Determinations now are final and non-appealable. Many of those Determinations also relied on one or more of the same regulations.

B. Specific Response to Issue 2

Subject to the foregoing objections, Calpine responds that at the time it filed the Application, Brazos Valley was subject to New Source Performance Standard ("NSPS") subpart Da, which the Executive Director acknowledged expressly in his award to Brazos Valley of a 100% Positive Use Determination on May 1, 2008.<sup>1</sup> A copy of the Positive Use Determination and the Technical Review Document are attached to this Supplement as Exhibit A. Since the filing of the Application, Brazos Valley has undergone modifications that require it to meet a more stringent NSPS than the one identified in its original application (i.e. subpart Da). Currently, Brazos Valley is subject to NSPS KKKK (dealing with Standards of Performance for Stationary Combustion Turbines). 40 C.F.R. pt. 60, subpart KKKK. After becoming subject to the requirements of NSPS KKKK, HRSGs are no longer subject to the requirements of NSPS Da. *Id.* §60.4305(b). Thus, when reviewing the Application in the light of the 2008 regulations, NSPS Da was accurate then. Today, other and additional regulations apply.

As a consequence, by this Supplement, Brazos Valley is revising the Application to reflect that the rules met or exceeded by the use of HRSGs are (i) NSPS KKKK, (ii) the Clean Air Interstate Rule ("CAIR"), (iii) Best Available Control Technology ("BACT"), and (iv) Greenhouse Gas ("GHG") BACT requirements. All of these rules are for the prevention and control of pollution, and Brazos Valley uses the HRSGs to meet or exceed each of these regulations.

<sup>1</sup> The Technical Review Document identifies NSPS Da as the appropriate rule. Specifically, the document states as follows:

40 CFR 60.Subpart DA: Standards of Performance for New Stationary Sources. Standards of performance for Electric Utility Steam Generating Units for Which Construction is Commenced after September 18, 1978. This is an appropriate rule.

### 1. NSPS KKKK

The NO<sub>x</sub> reduction requirements of NSPS KKKK are met or exceeded by the use of HRSGs at Brazos Valley. Section 60.4320 of subpart KKKK includes output-based standards that limit the amount of NO<sub>x</sub> that can be emitted into the atmosphere based upon the amount of electricity produced (expressed as pounds of pollutant per megawatt hour). 40 C.F.R. § 60.4320. The output-based standards allow facilities to meet more stringent NO<sub>x</sub> standards by increasing the efficiency of the facility as an alternative to add-on controls. 71 Fed. Reg. 38482, 38483 (July 6, 2006).

The inclusion of a HRSG as part of the production process reduces the amount of fuel burned to produce a megawatt hour of electricity. This reduction in the amount of fuel burned results in a reduction in the amount of NO<sub>x</sub> generated at the facility. Burning less fuel to produce the same amount of electricity meets or exceeds Section 60.4320's requirement to reduce NO<sub>x</sub> emissions without the need for further pollution control devices.

### 2. CAIR

The Brazos Valley's HRSGs also meet or exceed the requirements of CAIR. CAIR was implemented by the EPA to reduce the interstate transport of pollutants, especially NO<sub>x</sub> and sulfur dioxide. 70 Fed. Reg. 25162 (May 12, 2005). Section 101.506 of the TCEQ's rules implementing CAIR's NO<sub>x</sub> reductions in Texas directly relies upon increased fuel efficiency. 30 TAC §101.506. The increased fuel efficiency resulting from the use of HRSGs meets or exceeds Section 101.506's requirement to reduce NO<sub>x</sub> emissions.

### 3. BACT

In addition, TCEQ's BACT requirements are met or exceeded by the use of HRSGs. BACT is defined as the reduction in total emissions that can be achieved through the use of either: (i) add-on pollution control equipment; or (ii) production processes, systems, methods, or work practices. 30 TAC §116.10(1). As defined by the TCEQ's rules, BACT can be an add-on pollution control device or a "production process". A HRSG is an integral component of the selective catalytic reduction ("SCR") system, a system which TCEQ acknowledges in its own published guidelines satisfies BACT. *See TCEQ Combustion Sources, Current Best Available Control Technology (BACT) Requirements*. For a combined-cycle facility, an SCR system reduces the amount of NO<sub>x</sub> emitted by the facility and cannot function without a HRSG.<sup>2</sup> In other words, they constitute an integrated pollution control unit, and thus are used to meet or exceed BACT's requirements.

<sup>2</sup> Brazos Valley acknowledges that it received a positive use determination previously for the SCR system, but the HRSG component was not a part of that determination.

4. GHG BACT

In addition to the rules referenced above for the control of NOx emissions, HRSGs also reduce the emission of GHGs. EPA regulations require the permitting of GHGs for facilities that meet or exceed certain emission thresholds. 40 C.F.R. §52.21(b)(49)(iv)-(v). As part of the permitting process, a facility must meet BACT requirements. 40 C.F.R. §52.21(j). Currently, EPA regards fuel efficiency as the primary method by which a source will meet BACT. EPA and Title V Permitting Guidance for Greenhouse Gases, EPA-457/B-11-001, March 2011. The primary function served by a HRSG is to increase fuel efficiency and this function satisfies EPA's GHG BACT requirements. HRSGs exceed the requirements of Texas GHG laws by reducing GHG emissions well in advance of any mandatory requirement.<sup>3</sup>

III.

RESTATEMENT OF ISSUE 3 AND RESPONSE

*Issue 3: The reference to 30 TAC §106.512 does not appear appropriate. If you contend this citation still applies, please explain.*

Specific Response to Issue 3

Brazos Valley no longer contends that 30 TAC §106.512 applies to this facility. The regulatory requirements that are met or exceeded by the use of HRSGs at Brazos Valley are set forth in the response to Issue No. 2 above.

IV.

RESTATEMENT OF ISSUE 4 AND RESPONSE (INCLUDING OBJECTIONS)

*Issue 4: In addition to the proposed calculation, use the cost analysis procedure (CAP) contained in 30 TAC §17.17 to calculate a proposed use determination percentage.*

A. Objections to Issue 4

The CAP set forth in 30 TAC §17.17 was not added to the TCEQ's rules until 2010. This revision to the rules was in response to House Bills 3206 and 3544 of the 81st Texas Legislature that required the TCEQ to develop uniform standards and methods for all use determination applications. 35 Tex. Reg. 10964, 10965 (December 10, 2010). As stated by the TCEQ in the preamble to this rule, the revised rules do not apply to applications filed prior to January 1, 2009. *Id.* Brazos Valley submitted its Application on March 20, 2008. A copy of this Application is attached as Exhibit B. Retroactive application of the formulas added to the TCEQ rules in 2010 both violates the constitutional prohibition on retroactive laws and contravenes the express language of the legislation pursuant to which the amended rules were adopted. As a consequence, the TCEQ should not consider the CAP contained in Section 17.17 for the

<sup>3</sup> House Bill 788, which recently passed into law, provided TCEQ with the authority to issue GHG permits.

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

*Protecting Texas by Reducing and Preventing Pollution*

June 17, 2014

Ms. Kathryn Tronsberg Macciocca  
Director  
Duff & Phelps, LLC  
2000 Market Street, Ste 2700  
Philadelphia, PA 19103

Re: Notice of Negative Use Determination  
Brazos Valley Energy, LLC  
Brazos Valley Energy Center  
Richmond (Fort Bend County)  
Regulated Entity Number: RN102806346  
Customer Number: CN601424740  
Application Number: 11969  
Tracking Number: DPBRAZOSVALLEYB

Dear Ms. Macciocca:

This letter responds to Brazos Valley Energy, LLC's Application for Use Determination for Brazos Valley Energy Center, originally submitted on March 28, 2008 and remanded to the executive director (ED) on December 5, 2012 by the Texas Commission on Environmental Quality (TCEQ) commissioners. Your application seeks a use determination for two Heat Recovery Steam Generators (HRSGs) and requested a Tier IV partial use determination.

The ED has completed the review for application #07-11969 and the associated notice of deficiency (NOD) responses and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) Chapter 17. The Negative Use Determination is issued because the methods for determining the use determination percentage were not reasonable.

The Tier IV application process, in place in commission rules between February 2008 and December 2010, allowed an applicant to propose a method for calculating a partial use determination. The commission rules allow for determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. If the property is not used wholly for the control of air, water, or land pollution, the applicant must present information in the application for the determination of the proportion of the property that is pollution control. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the

Ms. Kathryn Tronsberg Macciocca  
June 17, 2014  
Page 2

responsibility of the ED to review the proposed method and make the final determination.

After careful review of the three methods for calculating a partial positive use determination included in the applicant's submittals, the ED has determined that all but one of the methods are unacceptable. The two methods proposed by the applicant do not reasonably distinguish the proportion of the HRSG that provides a purported pollution control benefit from the proportion of the HRSG that produces steam that is used in a process or to produce electricity for use or sale. The one method that the ED does find acceptable, the Cost Analysis Procedure (CAP) adopted by the commission, produces a negative number. Therefore, the property is not eligible for a positive use determination.

The following is an explanation of the ED's review of the methodologies presented in your application:

- **Avoided Emissions Approach (42%):** This approach is not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. Furthermore, the avoided emission approach does not attribute any value to production. By attributing the entire avoided emissions to the HRSGs, this approach ignores nitrogen oxides (NOx) reductions related to other property for which a positive use determination has been issued.
- **Modified CAP Calculations (48%):** Capital Cost New (CCN) includes a steam turbine and water systems. A negative determination was issued for the steam turbine on May 1, 2008. The steam turbine is not a part of this application and the related value cannot be included in CCN. The water systems are also production equipment and should not be included in CCN. Allowing Capital Cost Old (CCO) to be \$0 ignores that HRSGs are alternative production equipment. CCO is the cost of comparable equipment without the pollution control. If the HRSGs produce steam, then comparable equipment that produces steam without pollution control is a boiler. The ED does not find it reasonable to attribute \$0 cost to CCO in the CAP.
- **CAP as proposed by the executive director (-1723%):** The CAP formula was adopted by the commission to provide a methodology for determinations that distinguishes the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. The fact that the CAP as calculated results in a negative number shows that the HRSGs pollution prevention benefit is negated by its ability to produce a product.

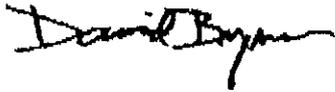
Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at [ronald.hatlett@tceq.texas.gov](mailto:ronald.hatlett@tceq.texas.gov), or write to the Texas

Ms. Kathryn Tronsberg Macciocca  
June 17, 2014  
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Commission on Environmental Quality, Tax Relief for Pollution Control Property  
Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,



David Brymer, Director  
Air Quality Division

DB/rh

cc: Chief Appraiser, Fort Bend Appraisal District, 2801 B. F. Terry Blvd., Richmond,  
Texas, 77441-5600

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 17, 2014

Ms. Kathryn Tronsberg Macciocca  
Director  
Duff & Phelps, LLC  
2000 Market Street, Ste 2700  
Philadelphia, PA 19103

Re: Notice of Negative Use Determination  
Brazos Valley Energy, LLC  
Brazos Valley Energy Center  
Richmond (Fort Bend County)  
Regulated Entity Number: RN102806346  
Customer Number: CN601424740  
Application Number: 11969  
Tracking Number: DPBRAZOSVALLEYB

Dear Ms. Macciocca:

This letter responds to Brazos Valley Energy, LLC's Application for Use Determination for Brazos Valley Energy Center, originally submitted on March 28, 2008 and remanded to the executive director (ED) on December 5, 2012 by the Texas Commission on Environmental Quality (TCEQ) commissioners. Your application seeks a use determination for two Heat Recovery Steam Generators (HRSGs) and requested a Tier IV partial use determination.

The ED has completed the review for application #07-11969 and the associated notice of deficiency (NOD) responses and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) Chapter 17. The Negative Use Determination is issued because the methods for determining the use determination percentage were not reasonable.

The Tier IV application process, in place in commission rules between February 2008 and December 2010, allowed an applicant to propose a method for calculating a partial use determination. The commission rules allow for determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. If the property is not used wholly for the control of air, water, or land pollution, the applicant must present information in the application for the determination of the proportion of the property that is pollution control. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the

Ms. Kathryn Tronsberg Macciocca

June 17, 2014

Page 2

responsibility of the ED to review the proposed method and make the final determination.

After careful review of the three methods for calculating a partial positive use determination included in the applicant's submittals, the ED has determined that all but one of the methods are unacceptable. The two methods proposed by the applicant do not reasonably distinguish the proportion of the HRSG that provides a purported pollution control benefit from the proportion of the HRSG that produces steam that is used in a process or to produce electricity for use or sale. The one method that the ED does find acceptable, the Cost Analysis Procedure (CAP) adopted by the commission, produces a negative number. Therefore, the property is not eligible for a positive use determination.

The following is an explanation of the ED's review of the methodologies presented in your application:

- **Avoided Emissions Approach (42%):** This approach is not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. Furthermore, the avoided emission approach does not attribute any value to production. By attributing the entire avoided emissions to the HRSGs, this approach ignores nitrogen oxides (NOx) reductions related to other property for which a positive use determination has been issued.
- **Modified CAP Calculations (48%):** Capital Cost New (CCN) includes a steam turbine and water systems. A negative determination was issued for the steam turbine on May 1, 2008. The steam turbine is not a part of this application and the related value cannot be included in CCN. The water systems are also production equipment and should not be included in CCN. Allowing Capital Cost Old (CCO) to be \$0 ignores that HRSGs are alternative production equipment. CCO is the cost of comparable equipment without the pollution control. If the HRSGs produce steam, then comparable equipment that produces steam without pollution control is a boiler. The ED does not find it reasonable to attribute \$0 cost to CCO in the CAP.
- **CAP as proposed by the executive director (-1723%):** The CAP formula was adopted by the commission to provide a methodology for determinations that distinguishes the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. The fact that the CAP as calculated results in a negative number shows that the HRSGs pollution prevention benefit is negated by its ability to produce a product.

Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at [ronald.hatlett@tceq.texas.gov](mailto:ronald.hatlett@tceq.texas.gov), or write to the Texas

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June 17, 2014  
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Commission on Environmental Quality, Tax Relief for Pollution Control Property  
Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,



David Brymer, Director  
Air Quality Division

DB/rh

cc: Chief Appraiser, Fort Bend Appraisal District, 2801 B. F. Terry Blvd., Richmond,  
Texas, 77441-5600

Bryan W. Shaw, Ph.D., P.E., Chairman  
Toby Baker, Commissioner  
Zak Covar, Commissioner  
Richard A. Hyde, P.E., Executive Director



JUN 13 2014

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
*Protecting Texas by Reducing and Preventing Pollution*

June 5, 2014

Mr. J. M. Harris  
Agent  
H & H Associates  
406 FM 3016  
Grapeland, Texas 75844

Re: Notice of Negative Use Determination  
Brazos Electric Power Cooperative, Inc.  
Johnson County Generation Facility  
Cleburne (Johnson County)  
Regulated Entity Number: RN100221985  
Customer Reference Number: CN600128821  
Application Number: 13544

Dear Mr. Harris:

This letter responds to Brazos Electric Power Cooperative, Inc.'s Application for Use Determination for Johnson County Generation Facility, originally submitted on April 27, 2009 and remanded to the executive director (ED) on December 5, 2012 by the Texas Commission on Environmental Quality (TCEQ) commissioners. Your Tier IV partial use determination application seeks a use determination for one Heat Recovery Steam Generator (HRSG) and dedicated ancillary systems.

The ED has completed the review for application #13544 and the associated notice of deficiency (NOD) responses and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) Chapter 17. The Negative Use Determination is issued because the methods for determining the use determination percentage were not reasonable.

The Tier IV application process, in place in commission rules between February 2008 and December 2010, allowed an applicant to propose a method for calculating a partial use determination. The commission rules allow for determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. If the property is not used wholly for the control of air, water, or land pollution, the applicant must present information in the application for the determination of the proportion of the property that is pollution control. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the responsibility of the ED to review the proposed method and make the final determination.

Mr. J. M. Harris  
June 5, 2014  
Page 2

After careful review of the five methods for calculating a partial positive use determination included in the applicant's submittals, the ED has determined that all but one of the methods are unacceptable. The four methods proposed by the applicant do not reasonably distinguish the proportion of the HRSG and dedicated ancillary systems that provides a purported pollution control benefit from the proportion of the HRSG and dedicated ancillary systems that produces steam that is used in a process or to produce electricity for use or sale. The one method that the ED does find acceptable, the Cost Analysis Procedure (CAP) adopted by the commission, produces a negative number. Therefore, the property is not eligible for a positive use determination.

The following is an explanation of the ED's review of the methodologies presented in your application:

- Executive Director's December 3, 2008 Brief (61%): Subsequent to filing the brief where this methodology is presented, the ED determined that the proposed calculation did not accurately calculate an appropriate use determination because the less efficient the equipment, the higher the positive use determination percentage it yielded. This produces an unreasonable result and should not provide the basis for a final determination.
- Avoided Emissions Approach (40%): This approach is not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. Furthermore, the avoided emission approach does not attribute any value to production. By attributing the entire avoided emissions to the HRSG and dedicated ancillary systems, this approach ignores nitrogen oxides (NOx) reductions related to other property for which a positive use determination has been issued.
- Modified CAP Calculation (64%): Capital Cost New (CCN) includes dedicated ancillary systems. Allowing Capital Cost Old (CCO) to be equal a pipe or spool piece ignores that HRSGs are alternative production equipment. CCO is the cost of comparable equipment without the pollution control. If the HRSGs produce steam, then comparable equipment that produces steam without pollution control is a boiler. The ED does not find it reasonable to equate CCO to a spool piece.
- Modified CAP Calculation (100%): Capital Cost New (CCN) includes dedicated ancillary systems. Allowing Capital Cost Old (CCO) to be \$0 ignores that HRSGs are alternative production equipment. CCO is the cost of comparable equipment without the pollution control. If the HRSGs produce steam, then comparable equipment that produces steam without pollution control is a boiler. The ED does not find it reasonable to attribute \$0 cost to CCO in the CAP.
- CAP as proposed by the executive director (-83%): The CAP formula was adopted by the commission to provide a methodology for determinations that distinguishes the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods

Mr. J. M. Harris  
June 5, 2014  
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or services. The fact that the CAP-calculated results in a negative number shows that the HRSGs' and dedicated ancillary equipment's pollution prevention benefit is negated by its ability to produce a product.

Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at [ronald.hatlett@tceq.texas.gov](mailto:ronald.hatlett@tceq.texas.gov), or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,



David Brymer, Director  
Air Quality Division

DB/rh

cc: Chief Appraiser, Johnson County Appraisal District, 109 N. Main St., Cleburne,  
Texas, 76033-4941

TCEQ DOCKET NO. 2012-1635-MIS-U

Appeal of Executive Director's Use	§	Before the
Determination Issued to Brazos Electric	§	
Power Cooperative, Inc.;	§	Texas Commission on
Johnson County Generation Facility	§	
CN600128821 / RN100223312	§	Environmental Quality
Application No. UD 13544	§	

**BRAZOS ELECTRIC POWER COOPERATIVE, INC.'S  
 REPLY TO THE EXECUTIVE DIRECTOR'S RESPONSE TO  
 THE APPEALS FILED ON THE NEGATIVE USE DETERMINATION FOR  
THE HEAT RECOVERY STEAM GENERATOR APPLICATIONS**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, Brazos Electric Power Cooperative, Inc. ("BEPC") and files its Reply to the Executive Director's Response to the Appeals Filed on the Negative Use Determinations for the Heat Recovery Steam Generator Applications. BEPC has met the statutory and regulatory requirements to establish its eligibility for a positive use determination, as set forth in its application, its appeal, this Reply and the record before the Commission. The Executive Director's negative use determination is not supported by the facts or the law, is contrary to TEX. TAX CODE § 11.31(k), (m), and 30 TEX. ADMIN. CODE § 17.17(b), is contrary to the evidence presented by BEPC and others similarly situated,<sup>1</sup> and cannot stand. BEPC, therefore,

<sup>1</sup> The argument and evidence presented by those similarly situated is incorporated herein by reference as if fully set forth herein including, without limitation, the argument and evidence presented in relation to Application Nos. UD 07-11914 (Tenaska Gateway Partners, Ltd- Rusk County); UD 07-11966 (Freestone Power Generation, L.P. - Freestone County); UD 07-11971 (Berger Energy Associates, L.P.- Hutchinson County); UD 07-11969 (Brazos Valley Energy, L.P.- Fort Bend County); UD 07-11994 (Freeport Energy Center, L.P.- Brazoria County); UD 07-11926 (CER-Colorado Bend Energy LLC (f/k/a Navasota Wharton Energy Partners, L.P.) -Wharton County); UD 12696 (EN Service's LP- Harrison County); UD 16409 (Bosque Power Company, LLC- Bosque County); UD 12210 & 12211 (Topaz Power Group, LLC- Nueces County); UD 15506, 16410, 16411 & 16412 (Cottonwood Energy Company LP - Newton County); UD 12268 (WolfHollow I, LP- Hood County); UD 13534 (South Texas Electric Cooperative, Inc. -Victoria County); UD 16413 (Brazos Electric Cooperative, Inc.- Jack County); UD 12004 (NRG Texas Power LLC- Limestone County); UD 07-12271 (Midlothian Energy Limited Partnership - Ellis County); UD 07-12202 (Wise County Power Company, LLC- Wise County); UD 07-12203 (Ennis Power Company, LLC- Ellis County); UD 15020 (Motiva Enterprises, LLC- Jefferson County); UD 07-12272 (Hay Energy Limited Partnership- Hays County); and UD 12826 (GIM Channelview Cogeneration LLC- Harris County).

consider this portion of the Executive Director's Response in this appeal. Subject to, and without waiving this objection, BEPC demonstrates herein that it complied with this element of the use determination eligibility requirements.

To be eligible for a positive use determination, the property for which an exemption is sought must have been "used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States ...." BEPC's Application No. 13544 met this requirement. In its revised application,<sup>3</sup> BEPC stated:

The Pollution Control Property (PC) (i.e., the HRSG and the dedicated ancillary systems) was installed to meet the requirements of 40 CFR Part 60.44da(a) (sic) "Standards for nitrogen oxides (NOX) for Electric Utility Steam Generating Units for new source performance standards (NSPS).

As well, the PC Property allows emissions to meet or exceed best available control technology (BACT) emission limitations established in federal operating permit # O-543. Per 30 Texas Administration Code (TAC) §122.143(4), the permit holder must comply with all terms and conditions codified in the permit and any provisional terms and conditions required to be included with the permit.

EPA's regulations, set forth in 40 C.F.R. § 60.44Da(a), establish NOx emission limits and reduction requirements. BEPC meets these limits and reduction requirements through its use of a combined-cycle combustion turbine system. The HRSG is the mechanism or device that allows BEPC's Plant to operate as a combine-cycle combustion turbine system. Without the HRSG, BEPC's Plant would be a single-cycle combustion turbine system; more energy would be needed to produce the same amount of electricity; more emissions would result. Karnei

<sup>3</sup> In its initial application, filed in April 2009, BEPC cited 40 C.F.R. Part 60; and 30 TEX. ADMIN. CODE §§ 116.110, 116.911, and 117.131 as the specific environmental rules or regulations that are met or exceeded by the installation of the HRSG. The Reply focuses on the provision cited in BEPC's revised application, 40 C.F.R. § 60.44Da(a). Although the Executive Director did not specifically analyze this provision in the Application Review Summary developed for Application No. 13544, the Executive Director's Response did address the eligibility of an Applicant which claimed this provision as the regulation met or exceeded through the use and installation of the HRSG.

Affidavit, Attachment H, para. 9-10. The HRSG, therefore, is a device used by BEPC to meet an EPA regulation, namely 40 C.F.R. § 60.44Da(a).

The Executive Director contends, for the first time, that for the cited regulation to meet the requirement of this element of eligibility for a positive use determination, there must be a "sufficient nexus" between the property and an environmental rule. The Executive Director stated, "A sufficient nexus must exist between the equipment and the environmental rule. Simply because an environmental rule applies to a piece of equipment, does not mean for the purposes of a use determination that this criteria is satisfied, nor does it mean the applicant qualifies for a property tax exemption." Response, at 11. The Executive Director continued, "No Applicant has cited to a rule that requires the installation of the HRSG. There is no rule that explicitly requires the installation of a HRSG nor is there a generally applicable efficiency standard that could only be met by installation of a HRSG." *Id.*

As noted above, the Legislature specified HRSGs as a type of equipment that could qualify for a positive use determination. The Executive Director's new interpretation of this element of eligibility for a positive use determination is inconsistent with the Legislature's action in this regard. Neither the statute nor TCEQ's rules reference a "nexus" requirement, or require the applicant to provide any information regarding the connection, link, tie, relationship, or interconnection between the property for which the positive use determination is sought, and the environmental rule that is met by its use, construction, acquisition, or installation. The Executive Director has not identified any source for this purported requirement nor has he defined or otherwise specified what relationship would meet his requirement for a "sufficient nexus."

The Executive Director's determination in this regard violates BEPC's due process rights. *See, e.g., Langford v. Employees Ret. Sys.*, 73 S.W.3d 560, 565-66 (Tex. App.-Austin 2002, pet.

denied) (due process concerns arose when agency failed to give applicant grounds on which it would rely for its decision and when agency denied application without deliberation). BEPC was never given notice of this "nexus" requirement or the necessity of having to address it in its Application or otherwise. Karnei Affidavit, Attachment H, para. 13. Also, if the Executive Director determined that BEPC's Application was deficient in its failure to properly cite an applicable environmental regulation, BEPC was entitled to a Notice of Deficiency and an opportunity to 'cure its allegedly incomplete Application. See 30 TEX. ADMIN. CODE § 17.12(2)(A).

Second, the Executive Director's wholesale rejection of the regulations cited by BEPC and the other similarly situated applicants as "applicable environmental regulations" runs afoul of equal protection principles and the requirements of uniformity, equality and fairness in approach. See TEX. TAX CODE § 11.31(g)(2); TEX. CONST. art. VIII, § 1(a); *BMW of North America, LLC, v. Motor Vehicle Board, et al.*, 115 S.W.3d 722, 726 (Tex. App. – Austin 2003); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). The Executive Director has previously granted multiple positive use determinations based on regulations cited by BEPC and the other applicants subject to the Executive Director's recent negative use determinations. Imposition of any new "nexus" requirement against these applicants is intrinsically discriminatory.

The novelty of this interpretation is evident from the Executive Director's prior technical reviews conducted on applications for positive use determinations related to HRSGs. The Executive Director has uniformly approved HRSG applications citing 40 C.F.R. § 60.44Da(a) as the rule that is met or exceeded by the installation and use of the HRSG. See e.g., Attachment L (certified copies of six use determinations approved based on a technical review determination that a HRSG was used to meet 40 C.F.R. § 60.44Da).

And rightfully so. This EPA rule establishes standards for NOx emissions and states:

On and after the date on which the initial performance test is completed or required to be completed under §60.8, whichever date comes first, no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility, except as provided under paragraphs (b), (d), (e), and (f) of this section, any gases that contain NOx (expressed as NO2) in excess of the following emission limits, based on a 30-day rolling average basis, except as provided under §60.48Da(j)(1):

(1) NOX emission limits:

Gaseous fuels:

Coal-derived fuels ..... 210 ng/J, 0.50lb/MMBtu  
All other fuels ..... 86 ng/J, 0.20 lb/MMBtu  
...

(2) NOx reduction requirement (Percent reduction of potential combustion concentration):

Gaseous fuels ..... 25  
Liquid fuels ..... 30  
Solid fuels ..... 65

40 C.F.R. § 60.44Da(a).

While HRSGs are not specifically mentioned in this section, HRSGs are subject to this regulation. EPA notes, within the applicability section of 40 C.F.R. Part 60, Subpart Da, that HRSGs are subject to this regulation:

This subpart will continue to apply to all other electric utility combined cycle gas turbines that are capable of combusting more than 73 MW (250 MMBtu/hr) heat input of fossil fuel in the *heat recovery steam generator*. If the *heat recovery steam generator is subject to this subpart* and the stationary combustion turbine is subject to either subpart GG or KKKK of this part, only emissions resulting from combustion of fuels in the steam-generating unit are subject to this subpart. (The stationary combustion turbine emissions are subject to subpart GG or KKKK, as applicable, of this part).

40 C.F.R. § 60.40Da(a)(4) (emphases added).

The Executive Director correctly noted that other portions of EPA's regulations also subject HRSGs to particular requirements. See Executive Director's Response, note 42 (referring to the applicability of 40 C.F.R. Part 60, Subparts Da, Db and KKKK). As the Executive Director noted, these subparts are mutually exclusive, i.e., if a HRSG is subject to one of these subparts, it is not subject to the others. See 40 C.F.R. §§ 60.40b(i), 60.4305(b); see also 40 C.F.R. § 60.40c(e). Contrary to the Executive Director's assertion, a HRSG is subject to any one of four separate EPA regulations, including 40 C.F.R. § 60.44Da(a). BEPC's citation of 40 C.F.R. § 60.44Da(a) complies with the requirement to identify an applicable EPA regulation that is met or exceeded through the use and installation of the HRSG, even under the Executive Director's newly asserted "nexus" requirement.

The Executive Director asserted that 40 C.F.R. Part 60, Subpart Da regulates only a portion of the plant and that applicants contend HRSGs increase the efficiency of the whole plant. Based on this assertion, the Executive Director concluded, "Because what is regulated by NSPS Da and Db is not the same as what Applicants state the control provided by HRSGs, there is not a sufficient nexus." Executive Director's Response, at 11. The "affected facility" to which 40 C.F.R. Part 60, Subpart Da is:

- ... each electric utility steam generating unit:
  - (1) That is capable of combusting more than 73 megawatts (MW) (250 million British thermal units per hour (MMBtu/hr)) heat input of fossil fuel (either alone or in combination with any other fuel); and
  - (2) For which construction, modification, or reconstruction is commenced after September 18, 1978.

40 C.F.R. § 60.40Da(a). "Electric utility steam generating unit" is defined as:

... any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW net-electrical output to any utility power distribution system for sale.

40 C.F.R. § 60.41Da. Respectfully, the Executive Director's assertion is in error.

Subpart Da regulates each electric utility steam generating unit. See 40 C.F.R. § 60.40Da(a). An electric utility combined cycle gas turbine is part of such a unit. See 40 C.F.R. § 60.41Da. A HRSG is part of the combined cycle gas turbine system. See 40 C.F.R. § 60.40Da(a)(4). As noted above, the HRSG is the device that makes the turbine system a combined-cycle gas turbine system. Karnei Affidavit, Attachment H, at para. 10. Again, BEPC's citation of 40 C.F.R. § 60.44Da(a) complies with the requirement to identify an applicable EPA regulation that is met or exceeded through the use and installation of the HRSG.

The Executive Director's assertion that an applicant must refer to a rule that specifically requires the installation of a HRSG, or that includes a "generally applicable efficiency standard that could only be met by installation of a HRSG" is contrary to the statute and TCEQ's rule, and is inconsistent with the Executive Director's prior reviews of HRSG positive use determination applications. Under the Executive Director's interpretation, it is unclear that any of the equipment identified by the Legislature as "pollution control equipment" would be eligible for a positive use determination. Neither the statute, nor TCEQ's rules, require that an applicant may only claim a positive use determination on equipment that constitutes the sole method of compliance with an environmental regulation.

The Executive Director's position is unsupported by the law and cannot stand. For this reason, this matter should be remanded back to the Executive Director.

**D. BEPC's HRSG Produces Anticipated Environmental Benefits**

As with the issue above, before addressing this issue, it should be noted that the Executive Director did not include, as a basis of his negative use determination, any allegation that BEPC did not identify the anticipated environmental benefits of its HRSG in Application