Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*

Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 5, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 DEC -5 PM 2: 11
CHIEF CLERKS OFFICE

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **FREESTONE POWER GENERATION, LP**
TCEQ DOCKET NO. 2008-0831-MIS-U

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Freestone County Appraisal District's Appeal regarding the above-entitled matter.

Sincerely,

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 DEC -5 PM 2: 12

CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2008-0831-MIS-U

IN THE MATTER OF THE APPEAL BY THE FREESTONE APPRAISAL DISTRICT OF THE EXECUTIVE DIRECTOR'S USE DETERMINATION NO. 07-11966 REGARDING FREESTONE POWER GENERATION, LP	§ § § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO FREESTONE COUNTY APPRAISAL DISTRICT'S APPEAL

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission) files the following response to the appeal of the Executive Director's decision concerning the above-referenced matter.

I. Introduction

On March 25, 2008, Freestone Power Generation LP (Freestone or Applicant) filed an application with the TCEQ for a Tier IV use determination for a heat recovery steam generation system (HRSG) and steam turbines. In support of the application Freestone provided to the ED a proposed formula for calculating the pollution control values of the HRSGs and the turbine system.

On May 1, 2008, the ED issued a use determination for the facility. The ED rejected the proposed formula but nevertheless issued a 100% positive determination for the two HRSG units concluding that the equipment was pollution control equipment and was installed to meet or exceed federal and/or state regulations. The ED made a negative determination for the steam turbine because the use of the steam turbine provides no environmental benefit to the site and is not considered pollution control equipment. In rejecting the applicant's proposed formula for

calculating the pollution control value of the HRSGs and steam turbines the ED concluded that the outcome from the applicant's formula is outcome determinative and did not focus on the pollution control aspects of the property. The ED provided no further explanation or analysis supporting his decision.

On May 14, 2008, the Freestone County Appraisal District (Freestone or Movant) filed an appeal regarding the ED's positive use determination for the heat recovery steam generators. In support of the appeal, the Movant claims that the heat recovery boilers described in the application are production equipment and not pollution equipment. Therefore, according to the Movant, the primary purpose of the equipment is not to satisfy air pollution standards and does not qualify for a 100% tax exemption.

We take no position on the merits of the Appellant's issues with the ED's decision at this time because we find that the ED provided no basis for the percentages he concluded were appropriate. Based on the limited information in the record, we conclude that while the ED may reject an applicant's proposed formula for determining the percentages of equipment associated with pollution control, he must provide an explanation of the specific method and analysis used to determine the percentages he recommends. For this reason, OPIC recommends that the Commission remand this matter for a new technical review and new use determination that fully lays out the method and formula used to reach the correct percentage for the use determination.

II. Applicable Law

The applicable TCEQ rules concerning tax relief for property used for environmental protection are found in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Because this application was deemed administratively complete after February 7, 2008, the most current rules apply to this application.

To obtain a positive use determination, "the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed 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." 30 TAC § 17.4(a). Chapter 17 contains a list of items (the Equipment and Categories List or ECL) that have been predetermined as used either wholly or partly for pollution control purposes. 30 TAC § 17.14. The ECL contains two parts: "Part A is a list of the property that the executive director has determined is used either wholly or partly for pollution control purposes, [and] Part B is a list of categories of property which is located in Texas Tax Code (TTC), § 11.31(k)." 30 TAC § 17.14(a). In addition, there are four different types of use determination applications:

> Tier I–An application which contains property that is in Part A of the figure in § 17.14(a) or that is necessary for the installation or operation of property located on Part A of the Equipment and Categories List; 30 TAC § 17.2(13)
>
> Tier II–An application for property that is used wholly for the control of air, water, and/or land pollution, but not on the Equipment and Categories List, located in § 17.14(a); 30 TAC § 17.2(14)

Tier III–An application for property used partially for the control of air, water, and/or land pollution but that is not included on the Equipment and Categories List, located in § 17.14(a); 30 TAC § 17.2(15)

Tier IV–An application containing only pollution control property which falls under a category located in Part B of the figure in § 17.14(a); 30 TAC § 17.2(16).

Sections 17.15(a) and (b) provide Decision Flow Charts for making use determinations. There are two Decision Flow Charts, one for non-Tier IV applications, and one for those applications which list only items from Part B of the ECL. 30 TAC § 17.15(a) & (b).

In addition, a partial use determination "must be requested for all property that is either not on Part A of the ECL...or does not fully satisfy the requirements for a 100% positive use determination." 30 TAC § 17.17(a). To calculate partial use for Tier IV applications, the cost analysis procedure in § 17.17(d) must be used. Section 17.17(d) states that "[i]t 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." 30 TAC § 17.17(d).

Under § 17.25, an appraisal district or applicant has 20 days to appeal a use determination issued by the ED. 30 TAC § 17.25(a)(2)(A) & (B); 30 TAC § 17.25(b). Upon a timely appeal, the Commission may either "deny the appeal and affirm the ED's use determination" or "remand the matter to the ED for a new determination." 30 TAC § 17.25(d)(2). Should the Commission remand the use determination, the ED shall conduct a new technical review and issue a new use determination. 30 TAC § 17.25(e)(1)(A) & (B). This determination may be appealed under the same Chapter 17 procedures as the initial determination. 30 TAC § 17.25(e)(2). If the

Commission denies the appeal and affirms the use determination, this decision is final and appealable. 30 TAC § 17.25(d)(3).

III. Analysis and Conclusion

In his Use Determination analysis, the ED disagrees with Freestone's proposed formula for calculating the pollution control value of the HRSGs. Nevertheless, the ED recommends a 100% exemption for the HRSGs and concludes that "the most appropriate formula has been determined by the Executive Director." However, the ED does not explain what the formula is or how he reached the conclusion of a 100% positive use determination even though he disagrees with the calculation methodology provided by Freestone. As described in 30 TAC § 17.17(d), the ED is required to review the proposed method and make the final determination. However, it is impossible to review that determination in this appeal without more information about how the ED calculated the use determination percentage. Therefore, OPIC recommends the Commission remand the matter to the ED for a new determination with instructions that the ED conduct a new technical review and issue a new use determination based upon a specific method and supporting analysis to assess a use determination percentage for the HRSGs. [1]

[1] As allowed by 30 TAC § 17.25(d)(2) and 30 TAC § 17.25(e)(1)(A) and (B).

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By _____

Scott A. Humphrey
Office of Public Interest Counsel
State Bar No. 10273100
TCEQ MC 103
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-6363
(512) 239-6377 Fax

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008 the original and seven copies of the foregoing were hand delivered to the TCEQ Chief Clerk. True and correct copies were also delivered to those on the attached service list via fax transmission, inter-agency mail, or deposit in the U.S. Mail.

_____
Scott A. Humphrey
Office of Public Interest Counsel

Mailing List
Freestone Power Generation LP
TCEQ Docket No. 2008-0831-MIS-U

Bud Black, RPA/CTA
Chief Appraiser
Freestone Central Appraisal District
218 North Mount
Fairfield, Texas 75840
903/389-5510 FAX 903/389-5955

Freestone Power Generation L.P.
717 Texas, Suite 1000
Houston, Texas 77002

Greg Maxim
Duff and Phelps LLC
919 Congress Ave., Suite 1450
Austin, Texas 78701
512/671-5580 FAX 512/671-5501

Pritchard & Abbott, Inc.
Attn: Mr. C. Wayne Frazell
4900 Overton Commons Court
Fort Worth, Texas 76132-3687
817/926-7861 FAX 817/927-5314

Chris Ehok
TCEQ Environmental Law Division MC 173
P.O. Box 13087
Austin, Texas 78711-3087
512/239-0600 FAX 512/239-0606

Ron Hatlett
TCEQ Small Business & Environmental
Assistance Division MC 110
P.O. Box 13087
Austin, Texas 78711-3087
512/239-3100 FAX 512/239-5678

Docket Clerk
TCEQ Office of Chief Clerk MC 105
P.O. Box 13087
Austin, Texas 78711-3087
512/239-3300 FAX 512/239-3311

Bridget Bohac
TCEQ Office of Public Assistance MC 108
P.O. Box 13087
Austin, Texas 78711-3087
512/239-4000 FAX 512/239-4007