Bryan W. Shaw, Ph.D., *Chairman*
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Zak Covar, *Executive Director*

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 4, 2012

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

RE: BRAZOS VALLEY ENERGY LLC
TCEQ DOCKET NO. 2008-0849-MIS-U

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Appeal of Negative Use Determination in the above-entitled matter.

Sincerely,

Amy Swanholm

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2008-0849-MIS-U

IN THE MATTER OF THE APPEAL	§	
BY BRAZOS VALLEY ENERGY LLC	§	BEFORE THE
OF NEGATIVE USE	§	TEXAS COMMISSION ON
DETERMINATION	§	ENVIRONMENTAL QUALITY
NO. 07-11969	§	

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO APPEAL OF NEGATIVE USE DETERMINATION

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

The Office of the Public Interest Counsel (OPIC) files this response to Brazos Valley Energy LLC's appeal of the negative use determination issued by the Executive Director (ED).

I. INTRODUCTION

In March 2008, Brazos Valley submitted a Tier IV use determination application to the Texas Commission on Environmental Quality (TCEQ). Brazos Valley sought use determinations for two thermally efficient heat recovery steam generators (HRSG) and one steam turbine generator associated with electric power generation at the Brazos Valley Power Plant in Richmond, Fort Bend County, Texas. The application describes the property as using natural gas-fueled, combined-cycle technology to power two combustion turbines. The heat produced by these turbines is captured by heat recovery steam generators, which produce steam used to turn steam turbines and generate additional electricity. In support of the application, Brazos Valley proposed a formula

for calculating the efficiency gain and environmental benefit percentages attributable to the equipment, as required per a Tier IV use determination application.

On May 1, 2008, the ED granted a 100% positive use determination for the Brazos Valley facility's HRSGs, while denying a positive determination for the steam turbines. The positive determination for the HRSGs was appealed by the Fort Bend Central Appraisal District on May 19, 2008. This matter was then consolidated with five other similar matters and set before the Commission for consideration.[1]

On February 23, 2009, the TCEQ Office of General Counsel granted an indefinite continuance, as requested by the ED. On June 18, 2012, the ED requested the General Counsel remand the six applications in the Consolidated Appeals for further processing. Finally, on July 10, 2012, the ED issued a 100% negative use determination for Brazos Valley and the other five facilities in the Consolidated Appeals. The ED stated that HRSGs are used solely for production and are not considered pollution control equipment. Therefore HRSGs are not eligible for a positive use determination.

On August 1, 2012, Brazos Valley appealed the ED's negative use determination for the two HRSG units. Brazos Valley argues the negative determination violates the Equal and Uniform Taxation Clause in Texas Constitution art. Viii, Section 1(a). Brazos Valley also argues the negative determination is arbitrary and capricious and contrary to the Texas Tax Code and TCEQ's own procedures. Finally, Brazos Valley believes the remand of the Consolidated Appeals was improper and, as such, should be rescinded and the 100% positive use determination reinstated. Alternatively, Brazos Valley

[1] In addition to the Brazos Valley matter, the application included: Tenaska Gateway Partners, Ltd (2008-0830-MIS-U); Freestone Power Generation, LLC (2008-0831-MIS-U); Borger Energy Associates, L.P. (2008-0832-MIS-U); Freeport Energy Center, L.P. (2008-0850-MIS-U); Navasota Wharton Energy Partners, L.P. (2008-0851-MIS-U)(Consolidated Appeals).

requests the current appeal be granted and the matter remanded to the ED for a new positive use determination.

OPIC recommends the Commission affirm the ED's negative use determination on the HRSG units and decline to consider the Appellants appeal of the two steam generation turbines.

II. APPLICABLE LAW

A. Legislative History

On November 2, 1993, Texas voters approved a constitutional amendment exempting certain pollution control property/equipment from property taxation. This amendment added Section (§) 1-l to Article 8 of the Texas Constitution. Legislation to implement the amendment was approved in House Bill (HB) 1920, 73rd Texas Legislature, 1993. This legislation added the new section 11.31 to the Texas Tax Code. The intent of the constitutional amendment was to ensure that capital expenditures undertaken to comply with environmental rules did not increase a facility's property taxes.

The 77th Texas Legislature, 2001, amended §11.31 to require the TCEQ to adopt specific standards for evaluating applications and create a formal procedure to allow applicants or appraisal districts to appeal a final determination.

The 80th Legislature, 2007, amended §11.31 by adding three new subsections. The first change required the TCEQ to adopt a nonexclusive list of property/equipment that included a list of 18 different categories, i.e., the Expedited Review List that is specified in §17.17(b) of the Texas Administrative Code. The second change required

that the list be reviewed at least once every three years and established a standard for removing property/equipment from the list. The third change established a 30-day review period for applications that contain only property/equipment listed on the Expedited Review List.

The 81st Texas Legislature, Regular Session, 2009, passed House Bills 3206 and 3544, amending §11.31 by adding two new sections. New section (g-1) requires that applications containing property/equipment adopted under §11.31(k) be reviewed using the methods and standards adopted under §11.31(g). New section (n) requires the establishment of a permanent advisory committee that is charged with advising the commission on the implementation of §11.31. In addition, the legislation corrected the agency's name in the statute and allowed for electronic appraisal district notifications as required by §11.31(d).

On November 18, 2010, the TCEQ adopted changes to 30 Tex. Admin. Code Chapter 17 to establish procedures and mechanisms for obtaining a use determination required to implement the amendments to §11.31 by House Bills 3206 and 3544, 81st Texas Legislature, Regular Session, 2009.

B. 30 Texas Administrative Code Chapter 17, 2008 Amendments

For applications submitted to the TCEQ prior to January 1, 2009, applicable TCEQ rules concerning tax relief for property used for environmental protection are found in Title 30 of the Texas Administrative Code, Chapter 17, as amended to be effective February 7, 2008.

The rules state that 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."[2]

Chapter 17 contains a list of items (the Equipment and Categories List, or ECL), predetermined as used either wholly or partly for pollution control purposes.[3] 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)."[4] 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;
>
> 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);
> 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);
> 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). [5]

Section 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 with just items from Part B of the ECL.[6]

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

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[2] 30 TEX. ADMIN. CODE § 17.4(a) (2008).
[3] *Id.* at § 17.14.
[4] *Id.* at § 17.14(a).
[5] *Id.* at § 17.2(13, 14, 15, 16).
[6] *Id.* at § 17.15(a), (b).

100% positive use determination."[7] To calculate partial use for Tier IV applications, the cost analysis procedure in § 17.17(d) must be used.[8] Section 17.17(d) states "[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."[9]

Under § 17.25, an appellant has 20 days to appeal a use determination issued by the ED.[10] 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."[11] Should the Commission remand the use determination, the ED shall conduct a new technical review and issue a new use determination.[12] This determination may be appealed.[13] If the Commission denies the appeal and affirms the use determination, this decision is final and appealable.[14]

C. 2010 Amendments to 30 TAC Chapter 17

The 81st Texas Legislature, Regular Session, 2009, passed House Bills 3206 and 3544, amending §11.31 of the Texas Tax Code by adding two new sections. On November 18, 2010, the TCEQ adopted changes to 30 Tex. Admin. Code Chapter 17 to incorporate the legislative changes.

The changes to 30 Tex. Admin. Code Chapter 17 abolished the Tier IV application, requiring that all use determination applications for property in Part B of

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[7] *Id.* at § 17.17(a).
[8] *Id.*
[9] *Id.* at § 17.17(d).
[10] *Id.* at § 17.25(a)(2)(A), (B), (b).
[11] *Id.* at §17.25(d)(2).
[12] *Id.* at § 17.25 (e)(1)(A), (B).
[13] *Id.* at § 17.25(e)(2).
[14] *Id.* at § 17.25(d)(3).

the ECL now must calculate the partial determination percentage using the Cost Analysis Procedure (CAP)[15] established by rule.[16] Previously applicants submitted their own method for determining pollution control percentage. The Expedited Review List contains those items designated by the legislature as included in the TCEQ's nonexclusive list, which were previously in Part B of the ECL.[17]

These changes also included the addition of authority allowing the General Counsel to remand a matter set on Agenda to the ED, if requested by the ED or OPIC.[18]

III. TIMELINESS

Under § 17.25, an appellant has 20 days to appeal a use determination issued by the ED.[19] The Appellant submitted its appeal of the ED's July 10, 2012 use determination within the 20 day deadline. Therefore this appeal is timely and may be considered by the Commission.

IV. ARGUMENT

A. Whether remand of the 2008 Consolidated Appeals was Proper

The Tax Code sets out the process for appealing a use determination issued by the ED. It states that after a timely appeal is filed, "the Commission shall consider the appeal at the next regularly scheduled meeting of the commission for which adequate

[15] *See id.* at § 17.17(c).
[16] *Id.* at §§ 17.10, 17.14, 17.17.
[17] TEX. TAX CODE § 11.31(k).
[18] 30 TEX. ADMIN. CODE §17.25(d).
[19] *Id.* at § 17.25(a)(2)(A), (b).

notice was given."[20] The Commission's statutorily designated actions are to either "remand the matter to the [ED] for a new determination or deny the appeal and affirm the [ED's] determination."[21] The Tax Code does not appear to give the Commission authority to remand a use determination appeal before considering the appeal at the next practical Agenda meeting.[22]

Subsection 17.25(d) of Title 30 Texas Administrative Code, effective as of 2010, allows the General Counsel to remand a use determination appeal upon request of the ED or OPIC. 30 TAC § 17.25(d) was not in effect when the 2008 Consolidated Appeals were filed. Appellant submitted its application for a Tier IV use determination on March 25, 2008, so the 2010 amendments to Chapter 17 do not apply to this application, including 30 TEX. ADMIN. CODE § 17.25(d). Appellant argues that remand of the 2008 Consolidated Appeals by the TCEQ Office of General Counsel under 30 TEX. ADMIN. CODE § 17.25(d) was improper. Remanding the matter under a rule that was not in effect when the Appellant submitted its application—and has no basis in the governing statute—would be improper.

However the General Counsel has general authority under 30 TEX. ADMIN. CODE § 10.4(d)—identical to his authority under 30 TEX. ADMIN. CODE § 17.25(d). This rule was in effect when the application was submitted, and when the appeal of the ED's positive use determination was filed. The TCEQ also has exclusive and original jurisdiction to

[20] TEX. TAX CODE § 11.31(e).
[21] *Id.*
[22] Where a statute prescribes the method by which the agency is to exercise its power to reexamine previous orders, that prescribed method excludes all others; no implied power exists. *Denton County Elec. Coop., Inc. v. Pub. Util. Comm'n of Texas*, 818 S.W.2d 490 (Tex. App.—Texarkana 1991, writ denied).

reevaluate its previous decisions, based on changing conditions.[23] And remand of the 2008 Consolidated Appeals was OPIC's recommendation before the matter was continued for three years.[24]

Furthermore, the retroactive application of a law is unconstitutional only if it destroys or impairs a vested right.[25] Since the Appellant will have an opportunity to argue before the Commission, the Appellant has not been deprived of any rights.

Although OPIC questions whether the matter may be remanded under § 17.25(d), the General Counsel had authority under 30 TEX. ADMIN. CODE § 10.4(d) to remand this matter. Therefore the Commission may take up the appeal of the July 10, 2012 negative use determination.

B. Whether the ED applied the Correct Rules when issuing its 2012 Use determination.

Appellant argues that the TCEQ, when issuing its 2012 negative use determination, should have applied Chapter 17 as it existed before it was amended in 2010, instead of applying Chapter 17 as it currently exists. The primary difference being that the Tier IV criteria was abolished in favor of a Tier III approach that would include partial use determination requests.

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[23] *S. Texas Indus. Servs., Inc. v. Texas Dep't of Water Res.*, 573 S.W.2d 302 (Tex. Civ. App. Austin 1978, writ refused n.r.e.) ("It is . . . well settled that an agency has the right to reopen a matter and enter a different order upon a showing of changed circumstances; however, the agency does not have the authority to review a former order upon the same fact situation.). *See also Magnolia Petroleum Co. v. New Process Prod. Co.*, 104 S.W.2d 1106 (Tex. 1937) ("If conditions change, rights change, and the governing statutes place the matter of ascertaining such rights and determining the facts relating thereto in the first instance under the jurisdiction of [the agency]." *Id.* at 1111).

[24] In OPIC's previous brief, OPIC recommended that 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, as allowed by 30 TEX. ADMIN. CODE § 17.25(d)(2), (e)(1)(A), (B)(2008).

[25] *Mont Belvieu Caverns LLC v. Texas Comm'n on Envtl. Quality*, No. 03-11-00442-CV, 2012 WL 3155763, at *19 (Tex. App.-Austin, Aug. 3, 2012).

It is impossible to determine from the ED's July 10, 2012 letter which version of Chapter 17 the ED used when issuing its use determination. However, the ED's determination appears to turn not on whether a Tier III or Tier IV use determination was necessary, but rather on whether HRSGs are used solely for production or for pollution control.[26] Please see Section III.C for a discussion of the ED's decision regarding pollution vs. production equipment.

Given the ED's finding that the HRSGs in question are used solely for production, it appears that the ED concluded that a negative use determination would result regardless of which version of the rules applied, and therefore did not specify whether a Tier II or Tier IV approach was followed. OPIC finds that the rules and statutes in effect when the Appellant submitted its application should be applied. The Code Construction Act states that "a statute is presumed to be prospective unless expressly made retrospective."[27] And the Texas Attorney General has clarified that "the same general principles [in TEX. GOV'T CODE § 311.022] also apply to agency rules."[28] Further, House Bills 3206 and 3544 "specifically [do] not apply to applications filed prior to January 1, 2009, or to applications filed after January 1, 2009, that received final determinations prior to September 1, 2009."[29]

Appellant submitted its application in April of 2008, therefore HB 3206 and HB 3544 as well as the 2010 amendments to Chapter 17 abolishing Tier IV would not apply to this application. If appeal of the 2012 negative use determinations is granted and this

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[26] TEX. TAX CODE § 11.31(a), (b).
[27] TEX. GOV'T CODE § 311.022.
[28] Op. Tex. Att'y Gen. No. GA-0655 (2008) (citing *R.R. Comm'n v. Lone Star Gas Co.*, 656 S.W.2d 412, 425 (Tex. 1983)).
[29] 35 Tex. Reg. 10965. *See also* Tex. H.B. 3206, 81st Leg., R.S. (2009).

matter is remanded to the ED for a new use determination, the ED should process this application as a Tier IV application.

C. Whether the ED's determination that HRSGs are "Production Equipment" was proper.

Appellant argues the ED's determination that HRSGs are solely used for production equipment is incorrect because it disregards statutory authority and is arbitrary and capricious insofar as it is inconsistent with prior use determinations on HRSGs. OPIC disagrees and defers to the ED's technical determination that HRSGS are solely used for production.

1. The statutory framework charges the ED with determining pollution vs. production capacity.

[statutory argument that ED can do what it did, defer to the ED on whether it should do what it did, as this is a technical determination that OPIC has neither the expertise to address nor is there information available in the public record etc]

Property used solely for production purposes is not eligible for tax exemption under Tax Code § 11.31.[30] The ED determined that the Appellant's HRSG equipment is used solely for production, and has issued a negative use determination. The ED has authority, subject to an appeal, to determine if a facility, device, or method is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution.[31] TCEQ's rules implementing § 11.31 must allow for determinations that

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[30] TEX. TAX CODE § 11.31(a), (b). The legislation enacting 11.31 provided that this tax exemption applies only to pollution control property that is constructed, acquired, or installed after January 1, 1994. *See* Act of May 10, 1993, 73d Leg., R.S., ch. 285, § 5(b), 1993 Tex. Gen. Laws 1322, 1325. Op. Tex. Att'y Gen. No. JC-0372 at 2 (2001).
[31] TEX. TAX CODE § 11.31(d).

distinguish between pollution control property (which is eligible for a tax exemption) and equipment, or the portion of equipment, that is attributed to production.[32]

The legislative intent of this section, as stated in the *Mont Belvieu* case, is "to limit the pollution-control property exemption solely to capital investment made to comply with state or federal environmental regulation that does not yield productive benefits and would thus otherwise be irrational economically."[33]

The ED clearly has authority to issue a negative use determination where it has determined that equipment is used solely for production, as opposed to pollution control. Even in situations where the equipment is listed in § 11.31(k), it is not a foregone conclusion that the equipment will receive a positive use determination.[34]

Whether the equipment at issue is used partially for pollution control or solely production is, ultimately, an inquiry conducted by the ED's technical staff with specific expertise in this area. The ED has concluded that "[HRSGs] are used solely for production."[35] OPIC also anticipates that the ED's response brief will provide further explanation of this conclusion. At this time, without contrary compelling information showing that the ED was incorrect, OPIC defers to the ED's conclusion.

2. Consistency with previous decisions.

Appellant argues that the TCEQ would be contradicting itself if it were to approve the ED's negative use determination, because the TCEQ has issued positive use

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[32] *Id.* at § 11.31(g)(3).
[33] *Mont Belvieu*, 2012 WL 3155763, at *19.
[34] 35 Tex.Reg. 10964.
[35] Letter from Chance Goodin, Team Leader, Air Quality Division, TCEQ, to Greg Maxim, Director, Duff and Phelps, LLC (July 10, 2012).

determinations for HRSGs in the past. This, Appellant argues, would amount to an arbitrary and capricious use of agency authority.

The issue of whether an administrative agency has acted arbitrarily and capriciously is a standard reserved generally for an appellate court's review of an agency action. The Commission is not limited in its review of a use determination.[36] Therefore any discussion of the "arbitrary and capricious" nature of the ED's use determination is premature. OPIC provides a brief discussion of this issue, though, as it may provide guidance for the Commission when determining whether to approve or deny the appeal of the ED's use determination, and because any appeal arising from the Commission's final action may be evaluated by reviewing courts as to whether the decision is arbitrary and capricious.

An administrative agency has acted arbitrarily and capriciously where it does not follow the clear, unambiguous language of its own regulation.[37] It also acts arbitrarily and capriciously if it fails to consider a factor that the Legislature has directed it to consider, considers an irrelevant factor, considers relevant factors but still reaches a completely unreasonable result, makes a decision without regard to facts, relies on findings not supported by evidence, or with rational connection between the facts and the decision.[38]

In addition, to determine an agency's proper exercise of its authority, "[s]tatutory exemptions from taxation," like the pollution-control exemption, "are subject to strict

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[36] Chapter 17 provides no standard by which the Commission may review the ED's use determination. It provides actions that the Commission may take upon evaluating a use determination appeal, but requires no deference to the ED's use determination, as would be necessary were the Commission evaluating the ED's use determination under an "arbitrary and capricious" standard of review.
[37] *Mont Belvieu*, 2012 WL 3155763, at *11 (quoting Rodriguez *v. Service Lloyds Ins. Co.*, 997 S.W.2d, 248, 245–55 (Tex. 1999).
[38] *City of Waco v. Texas Comm'n on Envtl. Quality*, 346 S.W.3d 781, 819 (Tex. App.—Austin 2011, pet. denied) (citing *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994)).

construction because they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally."[39] All doubts are resolved against granting an exemption.[40]

Although the Executive Director has changed its position on the issue of whether HRSGs offer pollution control, this does not necessarily mean that the Commission would be acting arbitrarily and capriciously by affirming the negative use determination. Further, the record on which a reviewing court would evaluate the arbitrary and capricious nature of TCEQ's action is not complete at this time.

First, the ED's position on HRSGs has evolved over time. Initially the ED issued 100% positive use determinations for HRSGs filing Tier IV applications.[41] [42] However, in responding to several appraisal districts' appeals of these use determinations, the ED stated that it initially issued 100% use determinations for the first set of applications it adjudicated under the (then) new Tier IV application.[43] Subsequently, the ED determined that 61% would be more appropriate for HRSG's, to account for the production gain and increased efficiency associated with the installation of HRSGs at a combined cycle power plant.[44]

Before the Commission could consider the ED's position on this matter at the February 25, 2009 Agenda, the ED requested, in an uncontested brief, additional time

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[39] *Mont Belvieu*, 2012 WL 3155763, at *11 (quoting *N. Alamo Water Supply Corp. v. Willacy County Appraisal Dist*, 804 S.W.2d 894, 899 (Tex. 1991).
[40] *Id.*
[41] See *Executive Director's Response Brief to Rusk County, Freestone, Central, Hutchinson County, Fort Bend Central, Brazoria County, and Wharton County Appraisal Districts' Appeals of the Executive Director's Use Determinations*, 2008-0830-MIS-U; 2008-0831-MIS-U; 2008-0832-MIS-U; 2008-0849-MIS-U; 2008-0850-MIS-U; 2008-0851-MIS-U, December 3, 2008 (hereinafter *ED's 2008 Consolidated Appeals Brief*).
[42] These applications were filed under TCEQ rules implementing HB 3732, effective February 7, 2009. The Tier IV application process was later abolished by TCEQ's rulemaking implementing HB3206 and HB 3544. *See* 33 Tex.Reg 932 (Feb. 1, 2008); 35 Tex.Reg 10965 (Dec. 10, 2010).
[43] *ED's 2008 Consolidated Appeals Brief*, at 9.
[44] *ED's 2008 Consolidated Appeals Brief*, at 10.

to continue evaluating its recommendation. On July 10, 2012, the ED issued a negative use determination for the Applicant's HRSG. The ED stated that HRSGs are used solely for production, and therefore not eligible for a positive use determination.

Appellant argues that he Commission cannot issue a negative use determination on these HRSGs because the Commission has already issued several positive use determinations on similar equipment, and had issued a positive use determination for this equipment. OPIC again must defer to the review by the ED's technical staff with specific expertise in this area.

OPIC does note that the Commission is not bound by prior decisions, as a reviewing court would be.[45] But an administrative agency may be called upon to "explain its reasoning when it appears...that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations."[46] An agency may also change its interpretation of a statutory tax scheme, as long as the new interpretation is not in conflict with a statute or formally promulgated rule.[47]

The record is not complete at this time, and will not be complete until the Commissioners issue a final order. The appeals process, as laid out in 30 TEX. ADMIN. CODE Chapter 17, affords the opportunity for the ED to provide more information to the public on how it reached its determination, and for the Commissioners to consider this information before making a determination. Although the July 10, 2012 letter provides no information as to why the ED no longer considers HRSGs pollution control equipment, OPIC defers to the ED on this technical issue and anticipates that the ED's

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[45] *Flores v. Employees Ret. Sys, of Texas*, 74 S.W.3d 532, 544–45 (Tex. App.—Austin 2003, pet. denied) (quoting *City of El Paso v. El Paso Elec. Co.*, 851 S.W.2d 896, 900 (Tex.App.—Austin 1993, writ denied).
[46] *Id.*
[47] *First Am. Title Ins., Co. v. Strayhorn*, 169 S.W.3d 298, 306 (Tex. App.—Austin 2005).

response brief will provide adequate explanation. Further explanation from the ED as well as the Commission's Agenda discussion and subsequent order memorializing the Commissioners' decision on this matter will serve to complete the record.

D. Equal and Uniform Taxation Clause

Appellant asserts that the ED's decision to issue a negative use determination for HRSGs violates the Texas Constitution's Equal and Uniform Taxation clause[48] because the TCEQ has previously issued positive use determinations to similarly situated HRSGs. OPIC disagrees. Further, this is the wrong forum for Appellant to challenge to the constitutionality of 30 TEX. ADMIN. CODE Chapter 17 generally.

An administrative agency may change its interpretation of a taxation scheme, insofar as that new interpretation does not contradict the statute and rules under which the scheme is administered.[49] And "uniformly enforce[ing] a statute until a certain date and then uniformly enforc[ing] the statute in a different manner does not mean there is a constitutional violation . . . . [T]axpayers do not acquire a right to pay less in taxes . . . because a tax policy was incorrectly implemented."[50]

The Equal and Uniform Taxation Clause does not prohibit the ED from changing positions on whether HRSGs provide any pollution control, or are purely production equipment. OPIC defers to the ED's technical determination on this issue, and anticipates that the ED will explain, through briefing and Agenda presentation, the basis for its changed position.

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[48] TEX. CONST. art. VIII, § 1(a).
[49] *First Am.*, at 306.
[50] *Id.* at 313.

E. Use Determination Appeal of the Steam Generation Turbines

Appellant's application for a use determination, submitted to the TCEQ in March of 2008, also requested a use determination on its steam turbine. Appellant has asserted that the 100% negative use determination issued by the ED on July 10, 2012 also encompasses the steam turbines, and therefore Appellant appeals the negative use determination for the steam turbines.

Appellant may not appeal the use determination on the steam turbine, as this appeal is untimely. The TCEQ, in its May 1, 2008 use determination, issued a negative use determination for the steam turbines.[51] This determination was not appealed within the 20 day deadline.[52] Fort Bend Central Appraisal District only appealed the ED's use determination for the HRSG units, not for the steam generator.[53] Therefore the Appellant's 2012 appeal of the steam turbine is untimely and may not be considered by the Commission.

V. CONCLUSION AND RECOMMENDATION

For the above reasons, OPIC recommends the Commission affirm the ED's negative use determination on the HRSG units and decline to consider the Appellants appeal of the steam generation turbine.

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[51] Tex. Comm'n on Envtl. Quality, *Use Determination for Brazos Valley Energy, LLC,* App. No. 07-11969 (May 1, 2008).
[52] Under § 17.25, an appellant has 20 days to appeal a use determination issued by the ED. 30 TEX. ADMIN. CODE § 17.25(a)(2)(A), (B).
[53] Fort Bend Central Appraisal District, *Appeal of Use Determination for Brazos Valley Energy, LLC,* App. No. 07-11966 (May 19, 2008).

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, the original and seven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

Amy Swanholm
Amy Swanholm

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