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*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 26, 2015

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

**RE: PANDA SHERMAN POWER, LLC; TCEQ DOCKET NO. 2015-0180-MIS-U  
PANDA TEMPLE POWER, LLC; TCEQ DOCKET NO. 2015-0181-MIS-U**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Appeals of Use Determinations in the above-entitled matters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett T. Arthur".

Garrett T. Arthur

cc: Mailing List

Enclosure



**DOCKET NOS. 2015-0180-MIS-U & 2015-0181-MIS-U**

**APPEALS OF § BEFORE THE  
USE DETERMINATIONS §  
BY PANDA SHERMAN § TEXAS COMMISSION ON  
POWER, LLC AND §  
PANDA TEMPLE POWER, LLC § ENVIRONMENTAL QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO USE DETERMINATION APPEALS**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the appeals submitted by the above-named Appellants of the Executive Director's (ED) negative use determinations.

**I. Background**

Panda Sherman Power, LLC and Panda Temple Power, LLC ("Appellants") submitted use determination applications to TCEQ on February 3, 2014. Panda Sherman operates a natural gas-fired combined cycle power plant in Sherman, Grayson County, and Panda Temple operates the same in Temple, Bell County. Both Appellants sought a positive use determination for a heat recovery steam generator (HRSG) at each site. On January 8, 2015, the ED issued negative use determinations to both Appellants. On February 2, 2015, both Appellants filed a timely appeal of the ED's negative determination.

These applications, the ED's use determinations, and the appeals are substantially similar, if not identical, and therefore, OPIC responds to both appeals in this single consolidated brief. For the reasons stated herein, OPIC respectfully recommends that both appeals be denied.

## **II. Applicable Law**

### **A. Texas Constitution**

On November 2, 1993, the Texas Constitution was amended to exempt certain pollution control property from ad valorem taxation. The amendment, known as "Prop 2", states:

The legislature by general law may exempt from ad valorem taxation all or part of real and personal property 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, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.<sup>1</sup>

### **B. Texas Tax Code § 11.31**

Regarding pollution control property, Texas Tax Code § 11.31 states:

A person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution. A person is not entitled to an exemption from taxation under this section solely on the basis that the person manufactures or produces a product or provides a service that prevents, monitors, controls, or reduces air, water, or land pollution.<sup>2</sup>

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<sup>1</sup> TEX. CONST. art. VIII, § 1-l(a).

<sup>2</sup> TEX. TAX CODE § 11.31(a).

Section 11.31(b) defines "pollution control property" as follows:

[A]ny structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is 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, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.<sup>3</sup>

Section 11.31(g) directs TCEQ to adopt rules to implement the section and states the adopted rules must:

- (1) establish specific standards for considering applications for determinations;
- (2) be sufficiently specific to ensure that determinations are equal and uniform; and
- (3) 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.<sup>4</sup>

Under § 11.31(k), TCEQ must establish a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution, and the list must include HRSG.<sup>5</sup> Section 11.31 also states that the standards and methods for making a determination apply uniformly to all applications for determinations, including applications relating to facilities, devices, or methods for the control of air, water, or land pollution included on the subsection (k) list.<sup>6</sup> The TCEQ must, by rule, update the (k) list at least

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<sup>3</sup> TEX. TAX CODE § 11.31(b).

<sup>4</sup> TEX. TAX CODE § 11.31(g).

<sup>5</sup> TEX. TAX CODE § 11.31(k)(8).

<sup>6</sup> TEX. TAX CODE § 11.31(g-1).

once every three years, and an item may be removed from the list if the Commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits.<sup>7</sup> Finally, § 11.31 states that the ED may not make a determination that property is pollution control property unless the property meets the standards established by rule under § 11.31.<sup>8</sup>

### **C. TCEQ Rules Chapter 17**

The TCEQ has implemented the statutory requirements of § 11.31 in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Under the Chapter 17 rules, a "Tier III" application is required for all property which does not fully satisfy the requirements for a 100% positive use determination.<sup>9</sup> For property in a Tier III application, the Cost Analysis Procedure (CAP) must be used to determine the creditable partial percentage.<sup>10</sup> If the CAP produces a negative number or a zero, the property is not eligible for a positive use determination.<sup>11</sup>

Section 17.10 requires certain information be included in a use determination application. All applications must cite the specific sections of the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the pollution control property.<sup>12</sup>

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<sup>7</sup> TEX. TAX CODE § 11.31(l).

<sup>8</sup> TEX. TAX CODE § 11.31(h).

<sup>9</sup> 30 TEX. ADMIN. CODE § 17.17(a).

<sup>10</sup> 30 TEX. ADMIN. CODE § 17.17(c).

<sup>11</sup> 30 TEX. ADMIN. CODE § 17.17(d).

<sup>12</sup> 30 TEX. ADMIN. CODE § 17.10(d)(4).

The application must also state the anticipated environmental benefits from the installation of the pollution control property for the control of air, water, or land pollution.<sup>13</sup> Section 17.2 defines "environmental benefit" as follows:

The prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the actions of the applicant. ... [E]nvironmental benefit does not include the prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the use or characteristics of the applicant's goods or service produced or provided. ... [T]he terms 'environmental benefit' and 'pollution control' are synonymous.<sup>14</sup>

A "marketable product" is defined as:

Anything produced or recovered using pollution control property that is sold as a product, is accumulated for later use, or is used as a raw material in a manufacturing process. Marketable product includes, but is not limited to, anything recovered or produced using the pollution control property and sold, traded, accumulated for later use, or used in a manufacturing process (including at a different facility). Marketable product does not include any emission credits or emission allowances that result from installation of the pollution control property.<sup>15</sup>

Section 17.6 describes property which is not eligible for exemption from taxation and is not entitled to a positive use determination. Property is not entitled to an exemption from taxation:

- (A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;
- (B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;

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<sup>13</sup> 30 TEX. ADMIN. CODE § 17.10(d)(1).

<sup>14</sup> 30 TEX. ADMIN. CODE § 17.2(4).

<sup>15</sup> 30 TEX. ADMIN. CODE § 17.2(5).

- (C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation 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; or
- (D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided.<sup>16</sup>

An applicant for a use determination may appeal the ED's determination to the TCEQ Commissioners using the process provided in §17.25.<sup>17</sup> An appeal must be filed with the TCEQ Chief Clerk within 20 days after receipt of the ED's determination letter.<sup>18</sup> The Commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination.<sup>19</sup>

### **III. Analysis**

For both applications, the ED's use determinations state:

Applications for property that is only partly used for pollution control are required to use the Cost Analysis Procedure (CAP), located in 30 TAC § 17.17(c)(1), to calculate the appropriate partial use determination. The Negative Use Determination is issued because the outcome of the CAP calculation was a negative number. Under 30 TAC § 17.17(d), if the CAP produces a negative number or a zero, the property is not eligible for a positive use determination.<sup>20</sup>

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<sup>16</sup> 30 TEX. ADMIN. CODE § 17.6(1).

<sup>17</sup> 30 TEX. ADMIN. CODE § 17.25(a)(2)(A).

<sup>18</sup> 30 TEX. ADMIN. CODE § 17.25(b).

<sup>19</sup> 30 TEX. ADMIN. CODE § 17.25(e)(2).

<sup>20</sup> ED's Use Determination Letters; January 8, 2015.

Both Panda appeals state that the HRSG should receive a positive use determination under § 11.31(k) of the Texas Tax Code. OPIC respectfully disagrees.

**A. Tax Code § 11.31(k)**

Other than citing § 11.31(k), Appellants do not provide any further explanation as to why a HRSG should receive a positive determination. Though the Panda appeals inadequately explain Appellants' position, OPIC can draw on our experience from previous appeals of HRSG use determinations to make certain assumptions about Appellants' position regarding § 11.31(k). Appellants are presumably asserting that if an item appears on the § 11.31(k) list, it automatically qualifies for at least a partial positive use determination. This assertion may be based on reading the "wholly or partly" language in § 11.31(m) to mean that a positive determination is required, and the result cannot be zero.<sup>21</sup> In other words, a negative use determination is not permissible. Assuming this is an accurate approximation of Appellants' position, OPIC respectfully disagrees.

To assume that HRSG are entitled to a positive use determination solely because they appear on the (k) list is to ignore other equally important subsections of § 11.31, such as (g-1). Under subsection (g-1), the standards and methods for making a use determination under § 11.31 that are established in TCEQ's implementing rules apply uniformly to all

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<sup>21</sup> TEX. TAX CODE § 11.31(m).

applications for determinations under § 11.31, including applications for facilities on the (k) list.<sup>22</sup> Therefore, when making a use determination, the ED must apply all relevant statutory and regulatory standards and methods, not just determine whether the property is on the (k) list.

Subsection (g) directs the TCEQ to adopt rules to implement § 11.31.<sup>23</sup> Those rules include 30 TAC § 17.17(c) and (d). Section 17.17(c) requires that Tier III applicants, such as Panda Sherman and Panda Temple, use the CAP to calculate the creditable partial percentage, and § 17.17(d) mandates that if the CAP produces a negative number, the property is not eligible for a positive determination.

As required by Tax Code § 11.31(g-1), the ED considered Appellants' applications under not just subsection (k), but all applicable standards, including TCEQ rule § 17.17. The Appellants, as Tier III applicants, were required to use the CAP, and when that calculation produced a negative number, the ED appropriately found that under 30 TAC § 17.17(d), the Appellants' HRSG are not eligible for positive use determinations. OPIC supports the ED's approach to look beyond Tax Code § 11.31(k) when evaluating HRSG applications and finds that (k) list items, including HRSG, are not automatically entitled to at least a partial positive use determination.

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<sup>22</sup> TEX. TAX CODE § 11.31(g-1).

<sup>23</sup> TEX. TAX CODE § 11.31(g).

## **B. Prior Commission Precedent**

The TCEQ Commissioners have considered, on multiple occasions, whether heat recovery steam generators should receive positive use determinations. Most recently in September 2014, the Commission considered 17 appeals of negative use determinations concerning HRSG at power plants. The ED had issued negative use determinations in all 17 dockets, and the Commission denied each appeal and affirmed all of the ED's negative use determinations.<sup>24</sup> OPIC sees nothing about these current appeals to distinguish them from the HRSG use determination appeals which the Commission denied just last year.

## **IV. Conclusion**

OPIC finds that the ED correctly applied the appropriate law to these appeals, and the law dictated the issuance of negative use determinations. OPIC supports the ED's position and respectfully recommends the Commission deny the appeals and affirm the ED's negative use determinations.

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<sup>24</sup> See TCEQ Orders issued September 30, 2014 for Docket Nos. 2008-0830-MIS-U, 2008-0831-MIS-U, 2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0850-MIS-U, 2008-0851-MIS-U, 2012-1559-MIS-U, 2012-1562-MIS-U, 2012-1586-MIS-U, 2012-1587-MIS-U, 2012-1635-MIS-U, 2012-1648-MIS-U, 2012-1650-MIS-U, 2012-1660-MIS-U, 2012-1662-MIS-U, 2012-1682-MIS-U, 2012-1683-MIS-U.

Respectfully submitted,

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By 

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## CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett T. Arthur



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