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March 11, 2008

Via Facsimile and Hand Delivery

Hon. Thomas H. Walston
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: SOAH Docket No. 582-07-3289; TCEQ Docket No. 2006-1730-PWS-E;
Executive Director of the Texas Commission on Environmental Quality
Petitioner, vs. Double Diamond Utilities Co. d/b/ White Bluff Community Water
System, Respondent

2008 MAR 11 PM 4:50
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Dear Judge Walston:

Enclosed please find Double Diamond Utilities Co. d/b/a White Bluff Community Water System's, Respondent, Exception to Proposal for Decision. The original and eleven copies are being filed with the Chief Clerk and copies are being delivered to the parties.

Sincerely,

Ali Abazari

Enclosures

cc: Office of the Chief Clerk
Benjamin O. Thompson, TCEQ Litigation Division
Blas Coy, TCEQ OPIC
Randy Graey

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SOAH DOCKET NO. 582-07-3289
TCEQ DOCKET NO. 2006-1730-PWS-E

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
PETITIONER

vs.

DOUBLE DIAMOND UTILITIES CO.
D/B/A WHITE BLUFF COMMUNITY
WATER SYSTEM, RESPONDENT

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

2008 MAR 11 PM 4:50
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

DOUBLE DIAMOND UTILITIES CO. D/B/A/ WHITE BLUFF
COMMUNITY WATER SYSTEM'S
EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

COMES NOW Double Diamond Utilities Co. d/b/a White Bluff Community Water System (the "Respondent") and files these exceptions to the Administrative Law Judge's Proposal for Decision ("PFD") in the above captioned matter, and in support hereof would respectfully show the following:

I.
STATEMENT OF THE CASE

The Executive Director ("ED") filed his First Amended Report and Petition (the "Petition") against Respondent on July 17, 2007, alleging that Respondent violated 30 TEX. ADMIN. CODE ("TAC") §§290.122(a)(2) and 290.46(q), by failing to issue a boil water notice within 24 after the pressure in the distribution system dropped below 20 psi. The ED alleges that the pressure in the distribution system dropped below 20 psi on June 9, 2006, thus triggering the need to issue a boil water notice to its customers within 24 hours. The ED recommended a penalty in the amount of two hundred and fifty (\$250) dollars and further recommended that Respondent "implement procedures to ensure that boil water notifications are provided to

customers" and to submit written certification that such procedures have been implemented. The hearing on the merits was convened on January 24, 2008, and a Proposal for Decision ("PFD") was issued on February 26, 2008. The Administrative Law Judge ("ALJ") concluded that the ED established by a preponderance of evidence that the pressure on the distribution system dropped below 20 psi on June 9, 2006, and that Respondent failed to issue a boil water notice within 24 hours, in violation of 30 TAC §290.46(q). The ALJ further concluded that the ED did not establish a violation of 30 TAC §290.122(a)(1). The ALJ recommended that the Commission assess a \$250 penalty and require Respondent to implement procedures to comply with the regulation.

II. EXCEPTIONS TO THE PFD

There is no dispute that that the water pressure in the distribution system dropped on June 9, 2006. The question before the Commission is whether the Executive Director showed by a preponderance of evidence that the pressure in the "distribution system" dropped below 20 psi on June 9, 2006. The term "distribution system" is defined as:

"A system of pipes that conveys potable water from a treatment plant to the consumers. The term includes pump stations, ground and elevated storage tanks, potable water mains, and potable water service lines and all associated valves, fittings, and meters, *but excludes potable water customer service lines.*"

30 TAC §290.38(15) (emphasis added).

The evidence in the record reflects that a total of 5 complaints were received by the ED. The complaints were received on June 12, 2006, and June 13, 2006. Three of the complaints, according to the ED's witness, Mr. Angel, were complaints that the water pressure was "low." As the testimony of these complainants did not support a finding that the water pressure dropped below 20 psi, Mr. Angel testified that he did not rely on these complaints in determining that the

water pressure in the distribution system dropped below 20 psi on June 9, 2006,¹ but rather the complaints merely suggested that the water system was experiencing some problems. The other two complaints were presumably those of John Bergman and Milton Weatherman, whose testimony, the Executive Director believed, supported the allegation that there was a drop in the "distribution system's" pressure to below 20 psi.

The testimony of these witnesses (Messrs. Weatherman and Bergman) is the only evidence in the record offered by the Executive Director that purports to convey the pressure of the "distribution system" on June 9, 2006, the specific date alleged by the ED to be the date of the violation.

The testimony of the two witnesses is as follows:

- Mr. Weatherman testified that at 6:30 a.m. on June 9, 2006 there was "a trickle coming out of the faucet." See Exh. ED-5. He further testified that security had informed him that a transformer had blown and that the pressure would build up throughout the day. Mr. Weatherman took the water pressure that afternoon, and he testified that his gauge showed a pressure of 18 psi.
- Mr. Bergman testified that on June 9, 2006, the water pressure at his home was "extremely weak." See Exh. ED-5. He further testified that there was not enough water pressure to shower and that it took the toilet several minutes to refill. Mr. Bergman further testified that he did not have a pressure gauge.

That is all the testimony offered by the ED that relates to the condition of the distribution system on the date in question. Nobody on Mr. Bergman's street complained about the water pressure being below 20 psi, or that they did not have any water pressure at their residence on

¹ According to 30 TAC §70.4, in evaluating the value and credibility of information provided by a private individual and determining the use of this information as evidence, the ED "shall" consider, amongst other criteria, the following:

- the individual providing the information must be willing to submit a sworn affidavit attesting to the facts that constitute the alleged violation and authenticating any writings, recordings, or photographs provided by the individual;
- the individual providing the information must be willing to testify in any enforcement proceedings regarding the alleged violations.

June 9, 2006. No complaints about lack of water pressure were received from the street across from, or behind Mr. Bergman's residence. No complaints about lack of water pressure were received from anybody in the vicinity of Mr. Bergman's residence.

Nobody on Mr. Weatherman's street complained about the water pressure being below 20 psi, or that they did not have any water pressure at their residence on June 9, 2006. No complaints about lack of water pressure were received from the street across from, or behind Mr. Weatherman's residence. No complaints about lack of water pressure were received from anybody in the vicinity of Mr. Weatherman's residence.

Only two customers, out of 538 customers served by Respondent, complained of no water pressure (to be distinguished from "low" water pressure, which does not suggest a drop in water pressure to below 20 psi), yet the ED and the ALJ conclude that this constitutes a "preponderance of evidence" that the pressure of the "*distribution system*" was below 20 psi. This conclusion is reached, even though, by definition, "the potable water customer service line" is excluded from the definition of "distribution system." In other words, the service line of Mr. Bergman and Mr. Weatherman is not part of the "distribution system." This is not to suggest that testimony regarding the customer service line is irrelevant or should not be considered in evaluating the condition of a "distribution system." Rather, it is to suggest that such testimony should be evaluated in light of testimony as related to the "system" as a whole. We respectfully believe that the ALJ failed to perform such an evaluation, and instead, merely determined whether Messrs. Weatherman's and Bergman's testimony was credible, and upon determining that they were credible, concluded that the pressure in the "distribution system" was below 20 psi. That is not the proper standard to evaluate the pressure of a distribution system. In essence, this standard would make it virtually impossible for a public water system to demonstrate that its

distribution system had the requisite water pressure once a customer complains of lack of water pressure.

Let us assume that one customer complains that he did not have water pressure on a certain date. Let us also assume that there are some 100 customer connections and nobody else complains of no water pressure. Under the standard used by the ALJ, the water service provider could prevail, not by demonstrating that the "distribution system" was operating above 20 psi or that the pressure on 99 customer service lines were above 20 psi, but rather, by performing a thorough analysis of the service line of the one complainant, in order to disprove allegations related to the "distribution system," which again, by definition excludes the customer's service line.²

The fact is that we have no reason to dispute Mr. Bergman's testimony.³ In fact, we find him credible and believe his testimony that on June 9, 2006, the water pressure at his house was "extremely weak." Based on his testimony, one can easily conclude that for a period of time on June 9, 2006, there was little to no water pressure at his residence. Respondent has no idea why the pressure at Mr. Bergman's home was so much lower than his neighbors' homes. Regardless, this testimony does not suggest that the "distribution system" dropped below 20 psi.

In fact, Respondent did everything imaginable, as explained by Richard Zint, Respondent's Utility Manger, to ensure that the "distribution system" did not drop below 20 psi. Testimony regarding the "water system" and Respondent's efforts to ensure that the pressure in the distribution system remained above 20 psi was as follows:

² ED witnesses, Messrs. Angel and Bullard, in no uncertain terms, testified that evidence of water pressure below 20 psi at one customer location is all that they need to conclude that the "distribution system" should issue a boil water notice.

³ We dispute Mr. Weatherman's testimony in its entirety. The evidence in the record suggests that Mr. Weatherman has a history of submitting complaints to Respondent and has in fact been involved in litigation against Double Diamond Companies, the parent company to Respondent, and the President of the company.

- Mr. Zint and other employees manually operated the switches on the pumps to ensure adequate water pressure.
- On the morning of June 9, 2006, while Mr. Zint was operating the pumps, employees were sent to 6-8 locations and obtained water pressure from those locations. The locations were strategically selected as they were the furthest areas that one could reach. All locations showed that the pressure was above 20 psi. Mr. Zint testified that he believed that one location was at 25 psi, while others were above 35 psi.
- Water pressure was monitored at the well sites and the pressure was above 35 psi.
- The water system has two well sites: Well Site No. 1 and Well Site No. 2. The system is set up in a manner that it can be supported by either well site alone in the event the other goes out of service.
- Mr. Zint testified that Well Site No. 2, the location of the blown transformer, is located some 5 miles from Mr. Weatherman's residence, and its failure would not impact Mr. Weatherman's pressure, as Well Site No. 1 was more proximal to his residence.
- Mr. Zint offered testimony that Mr. Weatherman has a homemade yard sprinkler system that is improperly connected, which could cause a loss of pressure between the house's hose bib and the faucet attached to the PVC piping. In fact, Respondent measured the pressure on Mr. Weatherman's home and on a flush valve on the distribution system across the street between January 19-22, 2008. This showed that the pressure on the distribution system was about 50-55 psi while the pressure on Mr. Weatherman's home ranged from 0 psi to 17 psi. Mr. Weatherman clearly has an issue with his plumbing. *See Exh. R-4.*

This evidence suggests that Respondent monitored the pressure of the distribution system and had no reason to believe that the pressure at the "distribution system" was below 20 psi. In fact, all the evidence suggested that the "distribution system" was functioning above 20 psi. The Executive Director has no direct evidence relating to the "distribution system." At the end, we have the following: two individuals that complained of no water pressure on June 9, 2006; Respondent believes that one of the two individuals has a bias against it as evidenced by litigation between Respondent's parent company (and its president) and Mr. Weatherman; Respondent believes that there is a problem with Mr. Weatherman's plumbing as evidenced by Mr. Zint's testimony and the pressure readings in January 2008 (*See Exh. R-4*); 536 customers had no complaints of lack of water pressure; Respondent monitored the pressure at various locations of the distribution system on the date in question and thereafter, and determined that

the pressure in the distribution system did not drop below 20 psi; Respondent has no explanation for the pressure, or lack thereof, at Mr. Bergman's residence on the date in question. The standard created by the ED and ALJ for the issuance of a boil water notice essentially overlooks the conditions of the "distribution system" and relies solely on a customer service line. This standard is contrary to the intent of the regulations, therefore, the allegation related to 30 TAC § 290.46(q) should be denied.

**III.
CONCLUSION**

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the Commissioner's grant Respondent's exceptions and that the pending enforcement action be dismissed.

Respectfully submitted,

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By: 
Ali Abazari
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UTILITIES, CO. D/B/A WHITE BLUFF
COMMUNITY WATER SYSTEM

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2008, a true and correct copy of the foregoing document was forwarded to the party listed below in the manner indicated.

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2008 MAR 11 PM 4:50
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