State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

August 4, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

VIA FACSIMILE(512)239-5533

Re: SOAH Docket No. 582-08-1023; TCEQ Docket No. 2007-1867-UCR; In Re: Application for a Water Rate/Tariff Change of Texas Landing Utilities, Certificate of Convenience and Necessity No. 11997 in Polk County, Application No. 35838-R and Conveyance and Necessity No. 20569 in Polk County, Application No. 35840-R

Dear Mr. Trobman:

This letter responds to the exceptions and replies to exceptions filed by the parties in this case.

Exceptions filed by protesting taxpayers

On March 8, 2011, the three protesting taxpayers, Bill Bryan, David Veniotte, and John Stacy, filed their exceptions. They asserted that the administrative law judge (ALJ) was incompetent and biased and that the proposal for decision (PFD) was factually flawed, poorly written, and unclear. The protesting taxpayers asserted that the ALJ's analysis was "legal nonsense." The protesting taxpayers declined to identify the errors in the PFD because they asserted that doing so would be a waste of their time. Based on these exceptions, the ALJ recommends no changes to the proposed order.

Exceptions filed by the Executive Director

1. On June 7, 2011, the Executive Director filed exceptions about the rate case expense issue. The Executive Director asserted that the PFD improperly placed the burden of proof on the Executive Director instead of on the applicant, Texas Landing Utilities. At page 31, the PFD restates the provisions of TEX. WATER CODE § 13.184(c) that state that the law places the burden of proof on the utility. The Executive Director's concern about the alleged misplacement of the burden of proof is based on the PFD's statement that " . . . the ED did not prevail in this case . . . . "

Although the PFD accurately places the burden of proof on the applicant, the language in the PFD could be revised to reflect greater precision. The ALJ recommends that the PFD be revised to read:

> In deciding that the applicant's evidence is more persuasive than that of the ED's on ~~does not prevail on either~~ Part I ~~or~~ and Part II, the ALJ also concludes that a preponderance of the evidence supports a finding that TLU's rate case expenses were reasonable and necessary.

2. In addition, the Executive Director excepted to the PFD because he asserted that the applicant failed to prove that the total amount of the rate case expenses were reasonable or necessary. The ALJ notes that the applicant presented the only evidence prepared by an expert in the field of law about the legal determination of reasonableness or necessity of the legal services. Based on the Executive Director's exceptions, the ALJ recommends no changes.

3. The Executive Director excepted to the PFD because he asserted that the applicant failed to prove that specific legal expenses were reasonable and necessary. The PFD weighed the parties' evidence about these specific expenses and concluded that the applicant's evidence was more persuasive than that presented by the Executive Director. The ALJ recommends no changes on this point.

4. The Executive Director excepted to the PFD's conclusion that the Executive Director's witness, Ms. Perryman, did not have the expertise to give an opinion about the reasonableness or necessity of individual legal fees. Although Ms. Perryman testified that she formed her opinion after relying conversations with staff counsel, she also testified that the Executive Director had made a "conscious decision" for her to provide evidence without assistance from counsel. The preponderance of the evidence did not favor the Executive Director's position. The ALJ recommends no changes on this point.

5. The Executive Director excepted to the PFD on the grounds that it nullified the public interest element by removing it from consideration. The PFD considered the public interest element in detail, including the history of its interpretation by the Texas courts of appeal and its treatment by the Commission. In making a recommendation, the ALJ weighed the parties' competing interests and arguments. The ALJ recommends no changes on this point.

6. The Executive Director excepted to the PFD on the grounds that it failed to provide any analysis of how the applicant allegedly satisfied its burden of proof based on the factors established in the Texas Disciplinary Rules of Professional Conduct " . . . or any other factors." The PFD reviewed the rules, including the history of the courts' application of the rules and the availability of other factors to address the same issues. The ALJ recommends no changes on this point.

7. The Executive Director excepted to the PFD's recommendation about Finding of Fact No. 58 and Ordering Provision No. 2. The exception is well-taken and should be adopted. The PFD should be amended to read:

> Finding of Fact No. 58:
> TLU customers are entitled to recover through a refund or credit all sums collected, between November 26, 2007 and the date this order becomes final, that exceed the rates approved by the Commission in this case, plus 0.61% interest on the over-collection, over the same period of time that the excess rate was collected.
>
> Ordering Provision No. 2:
> Within 45 days after the administrative order becomes final, TLU shall refund or credit to customers all sums collected between November 26, 2007 and the date this order becomes final, that exceed the rates approved by the Commission in this case, plus 0.61% interest on the over collection, over the same period of time that the excess rate was collected.

8. In the Executive Director's reply to the applicant's exceptions, the Executive Director recommended the adoption of two additional ordering provisions about the refund and the surcharge. These recommendations are well-taken and should be adopted:

> Ordering Provision No. 3:
> Texas Landing Utilities shall file a report to the Commission's Utilities and Districts Section, Water Supply Division, demonstrating compliance with the refund requirements of this Order. This report shall be filed each quarter until such time all overcharges and interest have been refunded.
>
> Ordering Provision No. 4:
> Texas Landing Utilities shall file a report to the Commission's Utilities and Districts Section, Water Supply Division, beginning six months after the date of this order, showing the total surcharge collected and the remaining balance. This report shall be filed semi-annually until such time the total balance has been collected.

<u>Exceptions filed by the applicant</u>

1. On June 7, 2011, the applicant filed exceptions about the line loss issue. The applicant excepted to the PFD's use of rate design data other than that used in the test year unless the PFD also makes adjustments for the cost of service data for the same period. The ALJ recommends no change.

2. The applicant requested that a change be made in Finding of Fact Nos. 28 and 46 and Conclusion of Law No. 15 in the original PFD issued by ALJ Smith on November 24, 2009.

The applicant asserted that in a February 2, 2010, letter to the Commission, ALJ Smith recommended that these changes be made. The Commission did not order the ALJ to consider these matters when the Commission remanded this case to SOAH. The ALJ recommends no changes.

3. The applicant requested that a change be made in Finding of Fact No. 34 to clarify the reason for the reduction in invested capital. The Commission did not order the ALJ to consider this matter when the Commission remanded this case to SOAH. The ALJ recommends no changes.

4. The applicant requested a clarification of Ordering Provision No. 2. This matter has been addressed in item 7 in the ALJ's review of the Executive Director's exceptions.

5. The applicant requested that the exhibits referenced and included in the original PFD be included with the new Proposed Order. ALJ Smith included with her proposed order the exhibits that were admitted in the original proceeding. The undersigned ALJ includes the exhibits that were admitted in the remand proceeding. The ALJ declines to recommend the adoption of the applicant's request to combine the two sets of exhibits.

Sincerely,

Paul D. Keeper

Paul D. Keeper
Administrative Law Judge

PDK:cm
cc: Service List (Mailed)

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STYLE/CASE: TEXAS LANDING UTILITIES

SOAH DOCKET NUMBER: 582-08-1023

REFERRING AGENCY CASE: 2007-1867-UCR

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TEXAS LANDING UTILITIES

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

February 2, 2010

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VIA FACSIMILE(512)239-5533

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Dear Mr. Trobman:

I have read the exceptions to the proposal for decision (PFD) and proposed order, which are pending before the Texas Commission on Environmental Quality. Having reviewed the exceptions submitted by the applicant Texas Landing Utilities (TLU), the protestant Texas Landing Property Owners' Association (TLPOA), the Executive Director (ED), and the Office of Public Interest Counsel, and the replies to the exceptions submitted by TLU, TLPOA, and the ED, I do not wish to make any substantive changes to the PFD or proposed order.

Based on the ED's and TLU's exceptions to the proposed order, I am making the following changes, however, to findings of fact nos. 28 and 46 and conclusion of law no. 15:

FOF 28. TLU's consolidated water rate schedule tariff will promote water conservation by including a gallonage charge of ~~$2.42~~ $2.36 for each additional 1,000 gallons above the minimum which requires ratepayers to pay more as their consumption increases.

FOF 46. Using the rate of return of 9.48%, TLU's return on its total invested capital of ~~$162,933~~ $162,935 for water is $15,446.

COL 15. The rates and gallonage charges set forth in Finding of Fact No. ~~52~~ 53 are just and reasonable; are not unreasonably preferential, prejudicial, or discriminatory; and are sufficient, equitable and consistent in application in accordance with TEX. WATER CODE ANN. § 13.182.

Sincerely,

Katherine L. Smith
Administrative Law Judge

2010 FEB -2 PM 1:21
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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: TEXAS LANDING UTILITIES

SOAH DOCKET NUMBER: 582-08-1023

REFERRING AGENCY CASE: 2007-1867-UCR

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