

**SOAH DOCKET NO. 582-08-1023
TCEQ DOCKET NO. 2007-1867-UCR**

APPLICATION FOR A WATER	§	BEFORE THE STATE OFFICE
RATE/TARIFF CHANGE OF TEXAS	§	
LANDING UTILITIES,	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 11997 IN POLK	§	
AND MONTGOMERY COUNTIES,	§	OF
APPLICATION NO. 35838-R, AND FOR	§	
A SEWER/RATE TARIFF CHANGE,	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 20569 IN POLK	§	
COUNTY, APPLICATION NO. 35840-R	§	ADMINISTRATIVE HEARINGS

**TEXAS LANDING UTILITIES' REPLY TO EXCEPTIONS TO THE
PROPOSAL FOR DECISION ON REMAND AND PROPOSED FINAL ORDER**

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

Applicant, Texas Landing Utilities ("TLU"), Certificates of Convenience and Necessity Nos. 11997 and 20569, respectfully submits its Reply to Exceptions to the Administrative Law Judge's ("ALJ") Proposal for Decision on Remand ("PFD") and Proposed Final Order,¹ and in support thereof would show the following:

I. INTRODUCTION

Despite the thorough and well-reasoned analysis provided by Hon. ALJ Paul D. Keeper in the PFD on Remand, the other parties continue to look past the record evidence and the law in their attempts to persuade the Commission to substantially reduce, or deny, TLU's recovery of its rate case expenses incurred and paid during this case. All their arguments were soundly rejected in the PFD on Remand. Now, the Protestants even go so far as to wrongfully accuse the ALJ of misconduct and

¹ TLU incorporates by reference all its previous arguments set forth in its closing arguments brief and reply brief from the initial hearing on the merits to the extent they relate to these issues.

bias. The record shows that 100% of TLU's rate case expenses sought were reasonably and necessarily incurred, and that it is in the public interest to permit recovery as recommended. Therefore, TLU respectfully requests that the Commission fully adopt the PFD on Remand recommendations with respect to rate case expenses with only the minor modifications discussed herein and in TLU's Exceptions and Corrections.

II. REPLY TO THE TCEQ EXECUTIVE DIRECTOR'S EXCEPTIONS

The TCEQ Executive Director's ("ED") exceptions are numerous and completely focused on the remanded rate case expense issue. Many of the ED's arguments and contentions were raised previously in this case and appropriately rejected in the PFD on Remand. Broadly, the ED's exceptions concern the manner in which the ALJ analyzed burden of proof, the ALJ's evaluation of the record evidence, and the ALJ's analysis of the "public interest." TLU submits that the ALJ handled all of these issues properly in the PFD on Remand.

A. Burden of Proof Was Properly Applied

The ED contends that neither the ED nor any other non-applicant party bears any evidentiary burden in TCEQ rate cases. The ED apparently believes there is no need for those parties to provide solid evidentiary support for their contentions in rebuttal to an applicant's evidence. If that were true, an applicant's *prima facie* evidence could be rebutted with any witness statement at all no matter how incredible. The ALJ properly evaluated the record evidence offered by all parties in this case.

First, the TCEQ rules address burden of proof and were followed in this case. Those rules required TLU to shoulder the burden of proof to support recovery of its rate case expenses and the corresponding surcharge rate by a preponderance of the evidence. 30 TEX. ADMIN. CODE §§ 80.17 and 291.12. The other "moving" parties, such as those affirmatively "moving" for a lower

alternative rate case expense amount, bear the burden of proof on those other matters. *Id.* Despite the ED's contentions to the contrary, the PFD on Remand confirms that TLU met its burden of proof over the course of two hearings and established a *prima facie* case that the other parties were required to rebut. PFD on Remand, at 3-26. The ED and other parties were given every opportunity to put forth their best evidence and arguments to do so. PFD on Remand, at 3-26. But the ALJ, the trier of fact, simply was not persuaded after analyzing the collective record and applicable law. *Id.* That does not mean the ALJ shifted the *entire* burden of proof in this hearing to the ED or other parties. The non-applicant parties bear the burden to support their own theories with credible evidence and did not do that here.

Second, Texas appellate courts have addressed sufficiency of attorney's fee evidence, part of rate case expenses, and how to handle situations where that evidence is uncontroverted. The PFD on Remand references several cases that discuss this topic. PFD on Remand, at 20. Though TLU offered witness testimony and supporting records in this case, multiple cases have held that much less is required to support fee awards. For example, an affidavit containing similar, but less detailed, information was deemed sufficient to prove up attorney's fees. *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892-893 (Tex. App.—Austin 2010, pets. denied) (citing *Texas Commerce Bank v. New*, 3 S.W.3d. 515, 517-518 (Tex. 1999)). A case cited in the ED's Exceptions (and by TLU in its Reply to Closing Arguments) also provides an example of an upheld attorney's fee award supported by uncontroverted and less detailed evidence than TLU provided here. *In re A.B.P.*, 291 S.W.3d 91, 98-99 (Tex. App.—Dallas 2009, no pet.). In that case, the court held documentary evidence is not even required. *Id.*

In light of these cases, the TCEQ rules, and the well-reasoned analysis contained in the PFD on Remand, it is not clear why the ED believes the ALJ did not appropriately consider the evidence

and each parties' evidentiary burden. The ALJ evaluated the record applying the proper burden of proof to each party.

B. ED's Evidence Received Appropriate Consideration

The ED takes issue with the ALJ's consideration of its proffered evidence in this case. The ED contends that the type of rate case expense evidence offered by its staff witness is probative because that "same type of evidence" has been "accepted" in past TCEQ rate cases. ED Exceptions, at 2. That argument is flawed for several reasons.

First, the ED's representation about past cases is not accurate. The ED's staff witness admitted that the type of recommendation provided in this case had *never* been used by TCEQ before. Tr. at 615:24 - 616:22 (Sheresia Perryman, January 12, 2011).

Second, the ALJ considered the ED's evidence and gave it the appropriate weight rather than excluding it. Over TLU's objections, the ED's rate case expense evidence was considered in this case despite the ED staff witness' lack of qualifications to provide the type of opinions offered; but the ALJ properly found that it "neither contradicted the testimony of TLU's witnesses nor showed that their testimony was unreasonable, incredible, or questionable," that the ED's recommended use of an "average" standard is "so simple that it barely achieves methodological status," and that the "average used in this case is not persuasive." PFD on Remand, at 20, 22.

Finally, the ED's contention is actually a strong reason for the Commission to adopt the PFD on Remand. The Commission should ensure that rate case expenses are properly evaluated in accordance with legally recognized non-arbitrary standards from this point forward. Here, the ED did not do that.

C. "Public Interest" was Properly Analyzed

The ED contends the ALJ's analysis of the "public interest" factor is incorrect and that somehow "public interest" is not addressed by the Texas Disciplinary Rules of Professional Conduct

("TDRPC"). TEX. DISCIPLINARY R. PROF. CONDUCT 1.04, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES, art. X, § 9). The whole point of those rules is to protect the public from unreasonable attorney's fees. That is in the "public interest". It is unclear why the ED opposes the use of TDRPC 1.04 here even though the ED actually endorsed use of those rules in the recent Lower Colorado River Authority ("LCRA") matter pending before SOAH on remand. *See Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, SOAH Docket No. 582-08-2863, *Executive Director's Reply to Closing Argument and Closing Argument on Rate Case Expenses*, at 13-14, 17-24. There is no reason why these factors cannot be used by the Commission in rate case expense evaluation.

D. Objective Factors are Required and Utility Size Not Determinative

For both legal and consultant rate case expenses, as the ALJ points out, some set of objective factors is needed. Also, as discussed in the *Lakeshore* case and the PFD on Remand, the Commission has the capability to promulgate rules that would alleviate the burden imposed on small utilities in bringing a rate case. PFD on Remand, at n.96 (citing *Texas Water Comm'n v. Lakeshore Utility Company, Inc.*, 877 S.W.2d 814, 818 n.4 (Tex. App.—Austin 1994, writ denied). That has not happened and the current TCEQ rate/tariff change process applies equally to all sizes of utilities. Therefore, arbitrarily reducing rate case expense recovery for a small utility forced to aggressively litigate its application against the type of opposition faced in this case is unfair. A good example of the type of baseless allegations TLU had to respond to throughout this case may be found in *Protestant Bill F. Bryan's Exceptions to the Proposed Order with Concurrence of David C. Veinotte and John Stacey* ("Protestants' Exceptions"). The level of work needed to professionally litigate this case did not hinge on TLU's size. PFD on Remand, at 26.

Nevertheless, the ED has focused on the size of TLU and its correspondent requested rate increase size as a driving factor behind its rate case expense recommendations in the hearing on

remand. Not only that, the ED has offered shifting recommendations on rate case expenses throughout this case. The ED's Exceptions even offers a new option that TLU has never heard before involving a 3-, 4-, or 5- year recovery period for the ED's recommended substantially reduced rate case expense amount. The ED is well aware that the 5-year option was suggested by TLU as a means of alleviating the monthly burden of the total amount sought, not the ED's reduced amount. The ED's strategy in this case has been result-driven and the tactics utilized, in some sense, appear designed to inflame instead of provide an expert recommendation. Regrettably, this strategy echos that used by the Protestants. *See* Protestants' Exceptions.

The "size" issue is really about the amount in controversy. But an approach that balances multiple factors, such as utilizing TDRPC 1.04 in which "amount involved and the results obtained" is only one factor to consider among many, is much more fair than either approach offered by the ED. Moreover, multiple cases have found that litigation expense awards may reasonably exceed the amount in controversy if the evidence warrants. *Marrs and Smith Partnership v. D.K. Boyd Oil and Gas Co., Inc.*, 223 S.W.3d 1, 23-24 (Tex. App.-El Paso 2005 pet. denied) (affirming \$187,185 attorney fee award in a case involving \$6,778 in actual damages); *Bank of Texas v. VR Electric, Inc.*, 276 S.W.3d 671, 684-685 (Tex. App.-Houston [1st Dist.] 2008, pet. denied) (affirming \$30,000 attorney fee award in a case involving \$7,035.26 in actual damages); *Cordova v. Southwestern Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 445-49 (Tex. App.-El Paso 2004, no pet.) (affirming fee award of \$18,007 in case involving \$7,092.18 in actual damages); *see also Norris v. Jackson*, No. 2-09-265-CV, 2010 WL 4261541, at *10-12 (Tex. App.-Fort Worth, Oct. 28, 2010) (Memorandum Opinion)(affirming \$27,500 in attorney's fees even though that amount exceeded various actual damage awards totaling \$9,000). Whatever factors are used, the public should be made aware of those factors through rules. PFD on Remand, at 25-26. The factors the Texas Supreme Court has

recognized are proper for attorney's fee reasonableness review are those in the TDRPC. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The ED's arguments about the utility's size, and its requested rate increase size, were considered and properly rejected as non-determinative in light of the entire record for this case. The Commission should adopt the ALJ's sound analysis and the entirety of the PFD on Remand related to rate case expenses with the minor modifications proposed in TLU's Exceptions and Proposed Corrections and discussed below.

III. REPLY TO OPIC'S EXCEPTIONS

OPIC has focused solely on the remanded rate case expense issue in its exceptions. For the most part, it is a reiteration of contentions previously raised in prior briefing. All of OPIC's contentions about the ALJ's rate case expense findings, including those regarding the "public interest", were either discussed in prior TLU briefing, addressed in reply to the ED's exceptions above, properly analyzed in the PFD on Remand, or addressed by some combination of the three. The ALJ has properly analyzed all appropriate "public interest" considerations, including those offered by OPIC, in the PFD on Remand and has recommended a thoughtful, balanced approach to the issue which the Commission should adopt.

TLU agrees with OPIC on one point. The PFD on Remand clearly makes a proper finding that recovery of TLU's rate case expense amount of \$248,175.60 is reasonable, necessary, *and in the public interest*, but that is not expressly stated in the proposed order. TLU submits that it would be appropriate to add that language to the ALJ's proposed order. TLU does not oppose adding that language to Finding of Fact No. 57, but it would also be appropriate to add that language to Conclusion of Law Nos. 16 and 17 given that this issue is a matter of law.²

² TLU notes that the phrase "and in the public interest" is only found in the TCEQ rules and not the applicable Texas Water Code provisions. The Texas Water Code uses the phrase "*or not in the public interest.*" TEX. WATER CODE § 13.185(h) (emphasis added).

IV. REPLY TO PROTESTANTS' EXCEPTIONS

The Protestants' exceptions are numerous and focus solely on the remanded rate case expense issue in their exceptions. For the most part, as with the other parties, this is also a reiteration of previous contentions that were rejected in the PFD on Remand. All the Protestants' contentions about the ALJ's rate case expense findings were either discussed in prior TLU briefing, addressed in reply to the ED's exceptions above, properly analyzed in the PFD on Remand, or addressed by some combination of the three. TLU is not going to address each of the Protestants' issues again here, but notes that the Protestants are the only parties to seek complete denial of TLU rate case expense recovery in both hearings.

TLU also notes that the Protestants' baseless accusations against the presiding ALJ are unconscionable. The Protestants have previously made inaccurate and disparaging accusations against TLU, its principals, its lawyers, and its witnesses throughout this case, some of which are included in the Protestants' Exceptions. But to accuse a judge of bias and improper conduct because he recommends findings adverse to the Protestants is uncalled for and highly inappropriate. The Protestants' Exceptions should provide the Commission with a feel for what TLU was forced to endure throughout this case and the credibility of the Protestants.

V. CONCLUSION

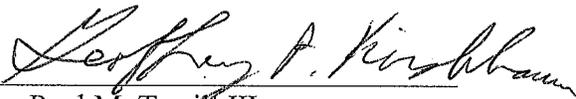
TLU is a small utility that has endured two hearings on the merits to get to this point. TLU continues to incur rate case expenses associated with this remand for which the Commission did not allow recovery in its interim remand decision over a year ago. Given the ALJ's sound analysis of the record pertaining to the remanded rate case expense issue, the Commission should not modify the ALJ's PFD on Remand Findings of Fact and Conclusions of Law on rate case expenses except

as discussed herein and in TLU's Exceptions and Proposed Corrections. TEXAS GOV'T CODE §2003.047(m). The arguments raised by the other parties in their exceptions lack merit.

TLU respectfully requests that the Commission adopt the ALJ's PFD on Remand and issue the ALJ's Proposed Final Order with the changes discussed herein and in TLU's Exceptions and Proposed Corrections. TLU respectfully requests approval of Application Nos. 35838-R and 35840-R, the rate/tariff changes requested by TLU in this proceeding, recovery of TLU's reasonable and necessary rate case expenses (which is in the public interest) as recommended by the presiding ALJ, and all other and further relief to which TLU may be entitled at law or in equity.

Respectfully submitted,

THE TERRILL FIRM, P.C.

By: 

Paul M. Terrill III
State Bar No. 00785094
Geoffrey P. Kirshbaum
State Bar No. 24029665
810 West 10th Street
Austin, Texas 78701
Tel: (512) 474-9100
Fax: (512) 474-9888

ATTORNEYS FOR TEXAS LANDING UTILITIES

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, a true and complete copy of the foregoing was sent to the following by facsimile, first-class mail or courier:

Parties	Representative / Address	Service
State Office of Administrative Hearings	Judge Paul D. Keeper 300 West 15 th Street, Suite 502 Austin, TX 78701	<i>via electronic filing</i>
TCEQ	Docket Clerk Office of the Chief Clerk P.O. Box 13087 Austin, TX 78711	<i>via electronic filing</i>
TCEQ Executive Director	Ron Olson TCEQ, MC-173 P.O. Box 13087 Austin, TX 78711-3087	<i>via fax to: 239-0606</i>
Office of Public Interest Counsel of TCEQ	Eli Martinez TCEQ, OPIC MC-103 P.O. Box 13087 Austin, TX 78711-3087	<i>via fax to: 239-6377</i>
Bill Bryan and Texas Landing Homeowners Association and Subdivision	Bill Bryan 235 Branding Iron Livingston, TX 77351	<i>via first-class mail</i>
David Veinotte and Texas Landing Homeowners Association and Subdivision	David Veinotte 174 Buffalo Ct. Livingston, TX 77351	<i>via first-class mail</i>
John Stacey and Texas Landing Homeowners Association and Subdivision	John Stacey 154 Buffalo Ct. Livingston, TX 77351	<i>via fax to: (936) 566-5994</i>



Geoffrey P. Kirshbaum

SOAH DOCKET NO. 582-08-1023
TCEQ DOCKET NO. 2007-1867-UCR

2009 DEC 28 PM 3: 04

APPLICATION FOR A WATER	§	BEFORE THE STATE OFFICE
RATE/TARIFF CHANGE OF TEXAS	§	CHIEF CLERKS OFFICE
LANDING UTILITIES,	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 11997 IN POLK	§	
AND MONTGOMERY COUNTIES,	§	OF
APPLICATION NO. 35838-R, AND FOR	§	
A SEWER/RATE TARIFF CHANGE,	§	
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY NO. 20569 IN POLK	§	
COUNTY, APPLICATION NO. 35840-R	§	ADMINISTRATIVE HEARINGS

**TEXAS LANDING UTILITIES' REPLY TO EXCEPTIONS TO THE
PROPOSAL FOR DECISION AND PROPOSED ORDER**

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

Applicant Texas Landing Utilities ("TLU"), water Certificate of Convenience and Necessity (CCN) No. 11997 and sewer CCN No. 20569, respectfully submits TLU's Reply to Exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") and Proposed Order filed by the Texas Landing Property Owners' Association ("TLPOA"), TCEQ Office of Public Interest Counsel ("OPIC"), and TCEQ Executive Director ("ED") in the matter of Application Nos. 35838-R and 35840-R (the "Applications"). In support thereof, TLU incorporates its Closing Arguments, Reply to Closing Arguments, and Exceptions to the ALJ's PFD and proposed Order all previously filed in this case. Additionally, TLU would show the following:

I. REPLY TO TLPOA EXCEPTIONS

TLPOA excepts to Findings of Fact ("FOFs") 23-25, 43, 45-47, 54-57 and Conclusions of Law ("COLs") 2, 6, 8-10, and 16-18. These FOFs and COLs relate to the ALJ's PFD discussions on the topics of TEX. WATER CODE § 13.145 substantial similarity of TLU's water systems, rate of return ("ROR"), rate case expenses, and the propriety of TLU's application filing. No exception presented by TLPOA warrants modification to the PFD or proposed Order FOFs and COLs.

A. Substantial Similarity FOFs and COLs Should be Affirmed

At the outset, TLU notes that uncontroverted evidence shows that TLU only has one sewer system. PFD, at 3; FOF 19. Therefore, substantial similarity is not an issue for the purpose of TLU's sewer tariff, although TLPOA still contests that point. TLPOA Exceptions, at 7. However, TLU does have two physically separate water systems that it operates together. TLPOA continues to dispute the substantial similarity of those systems within the meaning of TEX. WATER CODE § 13.145. The Commission should adhere to the ALJ's PFD recommendations on this issue and her corresponding FOFs and COLs.

TLPOA's suggestion that the Commission should adopt an analysis of TLU's Applications based on the recently announced post-hearing Commission decision in *Application of Double Diamond Utilities, Inc.* ("Double Diamond")¹, referenced in the ALJ's PFD, ignores the fact that the standard for substantial similarity announced in the *Aqua Texas* decision applied by the ALJ in her PFD was relied upon for the duration of the TLU Applications hearing. PFD, at 6-9; *see also* TLU-42 (Application by Aqua Utilities, Inc. and Aqua Development, Inc. d/b/a Aqua Texas, Inc., SOAH Docket Nos. 582-05-2770 and 582-05-2771); TLU-43 (TCEQ Order Approving Aqua Utilities, Inc. and Aqua Development, Inc. d/b/a Aqua Texas, Inc.'s Water and Sewer Rates, Issued 9/23/08) ("*Aqua Texas*"). As noted by the ALJ, the *Aqua Texas* approach was supported by the ED in the TLU Applications hearing. *Id.* Moreover, unlike in *Double Diamond* where it appears very little or no effort was made by the applicant to present TEX. WATER CODE § 13.145 evidence, TLU presented evidence in this case specifically addressing TEX. WATER CODE § 13.145 issues in line with the *Aqua Texas* decision because TLPOA challenged the consolidation issue here without regard for the factual and legal conclusions announced in that decision.²

¹ *In re Application of Double Diamond Utilities, Inc. to Change its Water Rates and Tariff in Hill, Palo Pinto, and Johnson Counties, Texas*, Application No. 35771-R, SOAH Docket No. 582-08-0698, TCEQ Docket No. 2007-1708-UCR.

² There were apparently multiple evidentiary failures found across the board with respect to the application filed in *Double Diamond*. Those failures are not present in this case.

TLU respectfully submits that the *Aqua Texas* decision actually sets forth the correct approach to TEX. WATER CODE § 13.145 when compared with *Double Diamond*. Neither the *Double Diamond* PFD nor Commission Final Order discuss the need to harmonize TEX. WATER CODE § 13.145 with the strong legislative preference for regionalization expressed in Chapter 13 of the Texas Water Code in the form of a mandate to the Commission to develop policies promoting the consolidation of systems under regional tariffs. *See, e.g.*, TEX. WATER CODE §§ 13.182(d), 13.183(c), and 13.241(d). In contrast, the *Aqua Texas* PFD provided an extensive analysis of that issue. TLU-42 (*Aqua Texas* PFD), at 24-27; TLU-43, *Aqua Texas* Commission Final Order, at 9-11, 18. Hence the rejection, for example, of the “snap shot” approach advocated by TLPOA here. *Aqua Texas*, PFD, at 24-27, 38; *see also* PFD, at 8-9. It is not clear why that analysis was not performed in *Double Diamond*.

Significantly, the ALJ in TLU’s case found there was little dispute about aspects of TEX. WATER CODE § 13.145 unrelated to cost of service. PFD, at 5. However, with respect to the cost of service issue, the Commission should adopt the ALJ’s approach to TEX. WATER CODE § 13.145, at least in this particular case if not others, applying *Aqua Texas*.

1. FOF 23

TLPOA excepts to FOF 23 because of differences in TLU’s two water systems while conceding that there are similarities. TLPOA Exceptions, at 2. The evidence considered by the ALJ in support of FOF 23 demonstrates that TLU’s water systems are substantially similar even if not identical. PFD, at 5. TLU reiterates that it met its burden to show substantial similarity in cost of service using the *Aqua Texas* standard; using that standard, the “subsidiz[ation]” alleged by TLPOA works both ways and balances out over time. PFD, at 8-9. The Commission should affirm FOF 23.

2. FOF 24

TLPOA excepts to FOF 24 because the TLU wells require blending to meet required arsenic limits. However, FOF 24 relates to the quality of water distributed to customers, not the quality of

raw water before treatment. PFD, at 5. The Commission should affirm FOF 24.

3. FOF 25

TLPOA excepts to FOF 25 regarding substantial similarity in cost of service between TLU's water systems based primarily on the *Double Diamond* decision, which should not be applied here. However, TLPOA also suggests that the testimony by Mr. David Veinotte should have allowed the ALJ to find against substantial similarity in cost of service for TLU's water systems. The ALJ's decision is sound because TLPOA's approach was flawed for multiple reasons besides not being in line with *Aqua Texas*.

TLPOA's suggested analysis misses the mark in numerous ways. First, as the ED and TLU pointed out, no separate cost of service study for each TLU system was mandated by rule for TLU's Applications. PFD, at 6, 9. Second, TLPOA's purported expert was not qualified to render an opinion about how to calculate cost of service for TCEQ-regulated investor-owned utilities. TLPOA-1 at 1:2 - 3:14 (Veinotte Prefiled); Tr. at 258:5 - 267:16, 304:4-11, and 310:17 - 317:18 (David Veinotte, May 22, 2009). Third, as discussed in TLU's Closing Arguments, TLPOA's approach was flawed because it:

- made no attempt to follow the Texas Water Code or the TCEQ rules [TLPOA - 1 at 51:17 - 54:12 (Veinotte Prefiled); TLPOA - 15 (Texas Landing Utilities Recommended Water Rates by Service Area); TLPOA-16 (Texas Landing Utilities Recommended Sewer Rates by Service Area); and TLPOA-17 (Texas Landing Utilities Recommended Water Rates by Service Area (Surcharge Refund Included in Joint Assets))];
- cherry picked numbers from various places to suit his purpose and make his end result come out like he wants - *i.e.*, lower rates for Texas Landing Subdivision customers and no other TLU customers [Tr. at 502:14-505:9, 508:23 - 512:22 (Marvin Morgan, May 22, 2009)].
- disregarded important aspects of rate-setting concepts that TCEQ rules require be considered such as original cost, straight line depreciation, proper treatment of customer contributions, the benefits of regionalized/consolidated systems and many other aspects of both Mr. Morgan's and TCEQ's staff's recommendations [*Id.*];
- initially proposed to use a 40% consumer price index increase as a measure of TLU's cost of service, a method which similarly did not comply with TCEQ rules or consider TLU's true cost of service [Tr. at 273:22 - 274:23 (David Veinotte, May 22,

2009). TLPOA does not even consider a volumetric charge in its rates. TLPOA-1 at 51:17 - 54:12 (Veinotte Prefiled); TLPOA - 15 (Texas Landing Utilities Recommended Water Rates by Service Area); TLPOA-16 (Texas Landing Utilities Recommended Sewer Rates by Service Area); and TLPOA-17 (Texas Landing Utilities Recommended Water Rates by Service Area (Surcharge Refund Included in Joint Assets)); and

- proposed rates that are discriminatory and in clear violation of the Texas Water Code because they ascribe different rates to customers within the same class [TEX. WATER CODE § 13.182].

As the ALJ points out, TLPOA's approach disregarded the fact that the Texas Landing Subdivision connections and the Mangum Estates/Bull Frog Basin Subdivisions' connections are physically served by the same water and sewer systems. PFD, at 8. Also, the statement that TLU did not controvert TLPOA's calculated cost per month per connection is false. TLPOA Exceptions, at 4. Those calculations collapse under the weight of the evidence discussed above that they were performed improperly.

There were good reasons for the ALJ to reject TLPOA's approach to cost of service and substantial similarity of same in this case. PFD, at 6-9. TLU met its burden of proof using the *Aqua Texas* standard. The Commission should affirm FOF 25.

4. COLs 6, 8, 9, and 10

TLPOA excepts to COLs 6, 8, 9, and 10 for essentially the same reasons it excepts to FOFs 23, 24, and 25. For all the reasons discussed above related to those FOFs, TLPOA's exceptions to COLs 6, 8, 9, and 10 should similarly be rejected in accordance with the PFD. The Commission should affirm COLs 6, 8, 9, and 10.

B. Rate of Return Issues

1. FOF 43 Should be Affirmed if ROR Worksheet Used

TLPOA's exception to FOF 43 is also in error. While TLU objects to the entire concept of using the ROR Worksheet to calculate ROR on equity and overall ROR in this case, Step G is an area where the ALJ correctly determined that TLU is entitled to a percentage point if the ROR Worksheet is used. PFD, at 20-21. As discussed, Step G requires finding that four out of five

criteria are met. PFD, at 20. The evidence shows that at least four criteria were met, and possibly all five.

TLPOA's contends that TLU does not have "well-maintained, up-to-date books and records". *Id.* This calls for a somewhat subjective analysis, further demonstrating why the ROR Worksheet is a problem. However, the ED's testifying expert witness, Sheresia Perryman, found TLU's general ledgers and invoice documentation to be well-maintained and up-to-date, and she was able to complete her desk audit of those records during her review of TLU's Applications. ED-1 at 2:13-21 (Perryman Prefiled); Tr. at 372:13-19, 383:19 - 384:3 (Sheresia Perryman, May 22, 2009); ED-SP-9 (Revised Staff's Calculation of Rate of Return). The ALJ correctly accepted this evidence in giving TLU credit for Step G. PFD, at 20. Contrary to TLPOA's accusation, Mr. Morgan did not "correct and/or create the books in preparation for the rate application". TLPOA Exceptions, at 4. Ms. Comstock used TLU's books and records to complete the Applications initially. Tr. at 475:13-19 (Kimberly Comstock, May 22, 2009); TLU-46 (Rate of Return Worksheet with Handwritten Changes). TLU's testifying expert, Marvin Morgan, analyzed the books as he found them and based any adjustments to the Applications on TLU records as they existed. Tr. at 144:7-9, 163:15-25 (Marvin Morgan, May 21, 2009). Mr. Morgan did not alter the books. Only one adjustment was made to the books by Ms. Comstock with respect to certain Goode City assets shortly before the hearing. Tr. at 104:8 - 106:12 (Kimberly Comstock, May 21, 2009); TLU-34 (Evergeeen Country, LLC Transaction Journal). That single adjustment does not mean TLU's books and records are not generally "well-maintained" and "up-to-date" as determined by the ED and ALJ. PFD, at 20; FOF 43. The evidence does not support TLPOA's exception to FOF 43 related to TLU's books and records.

The ALJ also correctly analyzed other Step G issues. The ALJ properly determined that TLU has effective communications and good customer relations aside from disagreements stemming from the Applications. PFD, at 21. The issue of whether TLU consistently meets its reporting

requirements and payment of fees is not contested. Tr. at 372:13-19 (Sheresia Perryman, May 22, 2009); Tr. at 487:11-16 (Karen Mann, May 22, 2009); ED-SP-9 (Revised Staff's Calculation of Rate of Return); TLU- 46 (Rate of Return Worksheet with Handwritten Changes); *see also* TLPOA Exceptions, at 4. The evidence also shows TLU reasonably held off on filing for a rate increase primarily because it wanted to grow its customer base first so that the costs on a per customer basis were lower, and TLU disagrees with TLPOA's contention that TLU should have filed for a rate increase sooner. Tr. at 475:20-25 (Kimberly Comstock, May 22, 2009).

Finally, TLU concurs with the ALJ's recommendation with respect to the fifth Step G criteria regarding water line loss, but only if the Commission decides that this step is a proper measure to use for rate of return and that test year information is the relevant set of information to analyze, as recommended by the ALJ. PFD, at 20. During the hearing, TLU's expert, Marvin Morgan testified that the 12% standard acts as a penalty that conflicts with his opinion that utilities should not be penalized for not chasing water leaks when unaccounted for water loss is at 15% or below. Tr. at 209:19 - 213:2 (Marvin Morgan, May 22, 2009). Another problem is that the ROR Worksheet does not clearly state which year to use for the purpose of "G.5". ED-SP-9 (Revised Staff's Calculation of Rate of Return); TLU-46 (Rate of Return Worksheet with Handwritten Changes). Regardless, TLU should get a percentage point here as recommended by the ALJ based on the other four criteria. PFD, at 20-21.

For all these reasons, TLPOA's exceptions to FOF 43 related to Step G of the ROR Worksheet are unsupported by the record evidence. The Commission should affirm FOF 43 if the ROR Worksheet is used.

2. FOF 45-47 - Total Rate of Return

TLPOA excepts to FOF 45-47 because it contends that TLU is only entitled to a ROR of 8.48%. For reasons discussed in prior TLU briefing, TLU contends that either a 12% ROR is appropriate or a 14.46% ROR if the ROR Worksheet is used. Therefore, TLU also excepts to FOF

45-47, but for different reasons.

Regardless of TLU's exceptions, the Commission should reject TLPOA's proposed 8.48% ROR because it is not supported by the evidence. As reflected by the evidence discussed in the PFD, there are multiple ROR Worksheet steps that must be seriously considered if the ROR Worksheet is used. At a minimum, an additional percentage point based on Step G is warranted (the ED initially recommended a second additional percentage point for a total of 10.48% based on Step C that was later retracted). PFD, at 20-22. In contrast, TLPOA's witness David Veinotte chose to cut TLU off from any further ROR Worksheet credit beyond Steps "A" and "B". TLPOA-11 (Rate of Return Worksheet); Tr. at 282:11 - 283:22 (David Veinotte, May 22, 2009). Mr. Veinotte claims he analyzed the remaining steps based on his "general knowledge" about TLU, but did not seek out any documents or records that were not in the application or discovery material to complete analysis of the remaining steps. *Id.* As reflected by the ALJ's PFD discussion of all ROR Worksheet steps, if the ROR Worksheet is used, TLPOA's approach is untenable.

C. Rate Case Expense FOFs and COLs Should be Affirmed

1. FOF 54-57

TLPOA excepts to FOF 54-57 related to rate case expenses. TLPOA purports to complain that TLU's rate case expenses are not in the public interest, but TLPOA is really complaining about their reasonableness and necessity. If the expenses were reasonable and necessary, as the ALJ determined, it is in the public interest for TLU to recover them. The hearing was held at TLPOA's request, was supposedly for the public interest, and necessitated TLU's participation. If TLU's rate case expenses were reasonable and necessary, as the ED and ALJ determined, TLU should be allowed to recover those expenses in this administrative proceeding because, as a private regulated utility, that is its only means of doing so. If TLU is not allowed to recover those expenses, despite their reasonableness and necessity, TLU's financial integrity will be adversely impacted in contravention of TEXAS WATER CODE § 13.183(a)(2) and such circumstances would constitute an

unconstitutional confiscatory taking of private property against the public interest. Moreover, deterioration in customer service could result, which would not serve the public interest. Consequently, the “reasonable and necessary” findings go hand in hand with an implied finding that recovery of those expenses is in the “public interest”. 30 TEX. ADMIN. CODE § 291.28(7).

TLPOA contends it has no burden to prove specific amounts are unreasonable. TLPOA Exceptions, at 5. TLU respectfully disagrees. To the extent TLPOA contends that certain TLU rate case expenses are unreasonable, TLPOA has a burden to prove that contention. Instead, TLPOA took the position throughout the hearing that TLU should not recover any rate case expenses at all in this case. TLPOA-1 at 49:6 - 50:13 (Veinotte Prefiled). Their position was that TLU is entitled to no rate case expenses because “[t]his whole mess was created by Mr. Sheffield.” *Id.* TLPOA-1 at 49:6 - 50:13 (Veinotte Prefiled). As correctly recognized by the ALJ, TLPOA presented no controverting evidence on rate case expenses and neither did the ED. PFD, at 30-31.

TLPOA misrepresents that it had only “last-minute evidence” to work with because Mr. Morgan and Mr. Terrill both offered testimony and exhibits reflecting the amounts they billed TLU for their respective work on this case and the reasonableness and necessity of those TLU expenses. TLU-D at 38:14 - 41:6 (Morgan Prefiled); TLU-E at 4:17 - 9:10 (Terrill Prefiled); TLU-20 (TLU Rate Case Expenses as of 10/10/2008); TLU-20A (Marvin Morgan’s Invoices); TLU-20B (The Terrill Firm’s Invoices).³

TLU does not wish to rehash old discovery disputes at this late stage in this proceeding, but is obliged to point out that TLPOA incorrectly asserts it was “forced” to bring its Motion to Compel against TLU. TLPOA Exceptions, at 5. TLU used a different acceptable method to support its rate case expenses in pre-filed testimony and TLPOA did not request the unredacted invoices it sought in its Motion to Compel (“MTC”) previously during discovery.

³ In accordance with the ALJ’s direction, these expense totals will necessarily be supplemented by affidavit post-PFD and post-exceptions. Tr. at 254:5 - 255:8 (May 22, 2009); PFD, at 30; *see also* Tr. at 138 (Marvin Morgan, May 21, 2009); Tr. at 231-233 (Paul Terrill, May 21, 2009).

Regardless, invoices for Mr. Morgan and Mr. Terrill's work, produced at the ALJ's direction with an opportunity to redact entries as appropriate, were offered into evidence and TLPOA had ample opportunity to challenge them. TLPOA-28 (Marvin B. Morgan Invoices); TLPOA-29 (The Terrill Firm Invoices). But the Third Court of Appeals in Austin recently determined unredacted fee bills are not necessary to support attorneys' fee amounts and that affidavits can be used that include sworn statements setting out the attorneys who performed the work, the number of hours billed by each, their hourly rates, a description of the tasks for which legal service were performed, the qualifications and experience of the affiant, and a statement about the customary nature of the fees charged. *Save Our Springs Alliance, Inc. v. City of Dripping Springs, et al.*, No. 03-04-00683-CV, 2009 WL 1896070, at *16 (Tex. App.— Austin, July 3, 2009) (not yet released for publication) Opinion in *Save Our Springs Alliance, Inc. v. City of Dripping Springs; Todd Purcell; and Mak Foster Ranch, L.P.*; Cause No. 03-04-00683-CV at 33-34. Moreover, rates for Mr. Terrill's law firm attorneys, which happened to be the attorneys in question representing one of the Defendants in that case, were approved as reasonable in that decision. *Id.* Mr. Terrill's testimony and exhibits took care of all those issues in this case. Nevertheless, the invoices themselves are in the record for consideration and TLPOA's exception should not be grounds for modifying the ALJ's rate case expense findings.

TLPOA also accuses Mr. Morgan of spending unnecessary time re-working TLU's books. TLPOA Closing Arguments, at 2-3, 12. That is simply false. Even though Mr. Morgan developed recommended adjustments to TLU's Applications during his review, he reviewed the books as presented to him by TLU without adjusting them. Tr. at 144:7-9, 163:15 - 25 (Marvin Morgan, May 21, 2009); TLU-D at 6:13 - 7:4 (Morgan Prefiled); TLU-24 (Corrected Application Schedules); TLU-25 (Depreciation Schedule - Water); TLU-26 (Depreciation Schedule - Sewer). Ms. Comstock made one simple bookkeeping adjustment regarding TLU's Goode City subdivision water system assets after conferring with Mr. Morgan about it, but the correction was for an entry she meant to

make in 2005 well before ever discussing it with Mr. Morgan. Tr. at 104:8 - 106:12 (Kimberly Comstock, May 21, 2009); TLU-34 (Evergreen Country, LLC Transaction Journal). Mr. Morgan's time was not spent re-working TLU's books.

TLPOA also complains about the amount of TLU's rate case expenses in comparison to TLU's annual revenue increase sought. First, this disregards the fact that the new funds sought by TLU continue from year to year until TLU's next rate case dating back to the effective date of TLU's proposed rates on November 26, 2007. TLU-32 (Notice of Proposed Rate Change). In other words, the "amount in controversy" is much broader than any single year because it recurs for many years. The ALJ recognizes this fact in her PFD. PFD, at 31. Second, this is an administrative proceeding (not a damage case) and many of the issues raised by TLPOA relate to establishment of certain rights (e.g. regionalization of rates) as opposed to the amount of TLU's proposed rate increase. "Type of controversy" is another consideration that should factor into the reasonableness of rate case expenses, not just "amount in controversy" as TLPOA contends. *Save Our Springs Alliance, Inc. v. City of Dripping Springs, et al.*, No. 03-04-00683-CV, 2009 WL 1896070, at *16 (Tex. App.—Austin, July 3, 2009) (not yet released for publication). As the *Aqua Texas* case demonstrated, more than \$2.75 million in rate case expenses was approved by the ALJs and the Commission, even though the "most significant issue" in the rate case was rate regionalization, the same issue TLPOA so vehemently opposes. TLU-42 at 13 (Application by Aqua Utilities, Inc. and Aqua Development, Inc. d/b/a Aqua Texas, Inc., SOAH Docket No. 582-05-2770 and 582-05-2771).

TLU's uncontroverted rate case expense testimony should be taken as true and TLU should be allowed to recover its rate case expenses as testified by Mr. Morgan and Mr. Terrill. TLU should be allowed to recover the entirety of its rate case expenses not because they are reasonable "per se," but because the preponderance of the evidence clearly shows their reasonableness. 30 TEX. ADMIN. CODE §§ 80.17(a) and 291.12. The ALJ's PFD affirms this conclusion and that TLU has met its burden of proof regarding the rate case expenses it seeks to recover. PFD, at 31. The Commission

should affirm FOFs 54-57.

2. COLs 16-18

TLPOA excepts to COLs 16-18 for essentially the same reasons it excepts to FOFs 54-57. For all the reasons discussed above related to those FOFs, TLPOA's exceptions to COLs 6, 8, 9, and 10 should similarly be rejected in accordance with the PFD. The Commission should affirm COLs 6, 8, 9, and 10.

D. COL 2 Regarding Application Filing Should be Affirmed

TLPOA excepts to COL 2 that it was proper for either David L. Sheffield or Texas Landing Utilities, L.L.C. to file the Applications for TLU. The ALJ correctly evaluated the evidence on this issue in her PFD. PFD, at 32. The Commission should affirm COL 2.

II. REPLY TO OPIC EXCEPTIONS

Unlike TLPOA, OPIC has focused the entirety of its exceptions on the TEX. WATER CODE § 13.145 substantial similarity issue, in part based on the *Double Diamond* decision. However, the Commission should reject OPIC's exceptions in favor of the ALJ's PFD analysis of this issue.

Regarding OPIC's cost of service analysis, TLU reiterates that the *Aqua Texas* standard should carry the day in lieu of the *Double Diamond* standard. Moreover, TLU met its burden of proof applying the *Aqua Texas* standard. TLU fails to see how depreciation is not a "real cost" as suggested by OPIC. OPIC Exceptions, at 7.

Regarding the remainder of OPIC's TEX. WATER CODE § 13.145 analysis, like TLPOA, OPIC elects to focus on dissimilarities as opposed to any of the evidence about similarities presented by TLU. Fortunately, the ALJ correctly weighed that evidence. The Commission should affirm ALJ's FOFs and COLs regarding TEX. WATER CODE § 13.145 to the extent applicable.

Contrary to OPIC's recommendation, it would in no event be appropriate for the Commission to throw out TLU's entire application and deny TLU's recovery of reasonable rate case expenses because of any perceived failure to prove entitlement to consolidation under TEX. WATER CODE §

13.145. OPIC Exceptions, at 1-2, 8. This is particularly true given that TLU litigated this case with the *Aqua Texas* decision in mind, not *Double Diamond* as OPIC suggests should be applied here. The result proposed by OPIC would be completely absurd and inequitable.

If the Commission determines that *Double Diamond* should apply here, and that TLU has not met its burden of proof under that standard, TLU respectfully suggests that a remand would be the appropriate result. However, significant time and resources have been spent by all involved in this case already, and TLU does not believe a remand is necessary for its Applications.

III. REPLY TO ED EXCEPTIONS

If the ED's proposed rates are adopted by the Commission, the ED's proposed corrections to FOFs 28 and 46 are also appropriate. However, TLU incorporates its prior exceptions to the ED rates, accepted by the ALJ, for various reasons.

IV. CONCLUSION AND PRAYER

After considering the foregoing, TLU respectfully requests that the Commission adopt the ALJ's PFD and issue the ALJ's proposed Order with the changes discussed in TLU's Exceptions. TLU respectfully requests approval of Application Nos. 35838-R and 35840-R and the rate/tariff changes requested by TLU in this proceeding.

Respectfully submitted,

THE TERRILL FIRM, P.C.

By: 

Paul M. Terrill III
State Bar No. 00785094
Geoffrey P. Kirshbaum
State Bar No. 24029665
810 West 10th Street
Austin, Texas 78701
Tel: (512) 474-9100
Fax: (512) 474-9888

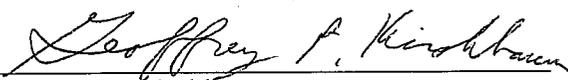
ATTORNEYS FOR TEXAS LANDING UTILITIES

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2009, a true and complete copy of the foregoing was sent to the following by facsimile, first-class mail or courier:

Parties	Representative / Address	Service
State Office of Administrative Hearings	Judge Katherine L. Smith 300 West 15 th Street, Suite 502 Austin, TX 78701 Tel: 475-4993 Fax: 475-4994	<i>via fax to: 475-4994</i>
State Office of Administrative Hearings	SOAH - Docket Clerk 300 West 15 th Street, Suite 502 Austin, TX 78701 Tel: 475-4993 Fax: 475-4994	<i>via fax to: 475-4994</i>
TCEQ	Docket Clerk Office of the Chief Clerk P.O. Box 13087 Austin, TX 78711 Tel: 239-3300 Fax: 239-3311	<i>via fax to: 239-3311 and via hand-delivery</i>
TCEQ Executive Director	Ron Olson TCEQ MC-173 P.O. Box 13087 Austin, TX 78711-3087 Tel: 239-0144 Fax: 239-0606	<i>via fax to: 239-0606</i>
Office of Public Interest Counsel of TCEQ	Eli Martinez TCEQ, OPIC MC-103 P.O. Box 13087 Austin, TX 78711-3087 Tel: 239-3974 Fax: 239-6367	<i>via fax to: 239-6377</i>
Texas Landing Property Owners Association, David Veinotte, Bill Bryan and John Stacey	Michael Deitch Law Offices of Michael Deitch 800 Rio Grande Austin, TX 78701	<i>via fax to: 474-1579</i>

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
 2009 DEC 28 PM 3:04
 CHIEF CLERKS OFFICE


 Geoffrey P. Kirshbaum