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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 7, 2011

Ms. Melissa Chao, Acting Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Re: Application of Texas Landing Utilities to change its water and sewer rates/tariff under CCN Nos. 11997 and 20569 in Polk and Montgomery Counties. SOAH Docket No. 582-08-1023; TCEQ Docket No. 2007-1867-UCR.

Dear Ms. Chao:

Enclosed for filing with the Texas Commission on Environmental Quality is the original plus seven copies of "The Executive Director's Exceptions to the Proposal for Decision and Proposed Order" for the above referenced matter.

If you have any questions, please call me at (512) 239-0608.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron M. Olson".

Ron M. Olson
Staff Attorney
Environmental Law Division

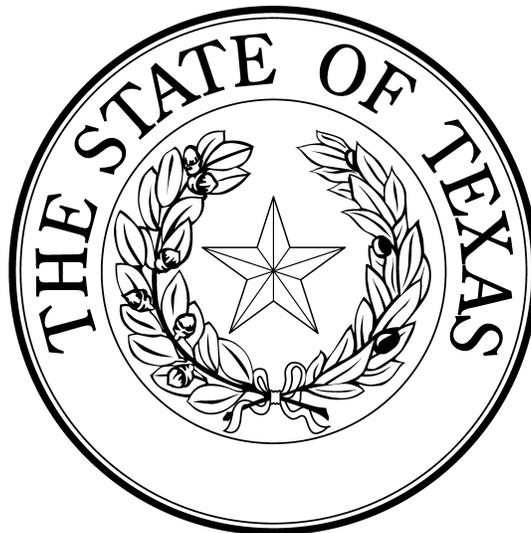
Enclosure

cc: Mailing List

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

APPLICATION OF TEXAS	§	BEFORE THE TEXAS COMMISSION
LANDING UTILITIES FOR A	§	
WATER RATE/TARIFF	§	
CHANGE, CERTIFICATE OF	§	
CONVENIENCE AND	§	
NECESSITY NO. 11997 IN POLK	§	
AND MONTGOMERY	§	ON
COUNTIES; AND FOR A SEWER	§	
RATE/TARIFF CHANGE,	§	
CERTIFICATE OF	§	
CONVENIENCE AND	§	
NECESSITY NO. 20569 IN POLK	§	
COUNTY	§	ENVIRONMENTAL QUALITY

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL
FOR DECISION AND PROPOSED ORDER**



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JUNE 7, 2011

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At the February 10, 2010 Agenda, the Commission expressed its concerns that the \$142,314.81 in rate case expenses, which was in front of the Commission at that time, was “astronomical” and “far over shadowed the rates that are being considered.”¹ As a result, the Commissioners remanded the matter to SOAH to collect evidence to determine what portion of TLU’s claimed rate case expenses are reasonable, necessary and in the public interest. Had the Commission concurred with TLU’s rate case expenses, it could have adopted that amount at the February Agenda.² However, the Commissioners decided not to approve TLU’s excessive amount of rate case expenses.³ Despite the Commission’s concerns, the ALJ recommends recovery of an even larger amount of rate case expenses - \$248,175.60. On remand the Executive Director presented probative evidence specifically contradicting TLU’s invoices and the total amount of rate case expenses. The expert testimony presented by the ED’s witness is the same type of evidence that has always been provided by staff and accepted by SOAH and the Commission in water utility rate cases.⁴ After reviewing all the information the Executive Director recommended that TLU be allowed to recover \$60,756 in rate case expenses that are reasonable, necessary, and in the public interest.⁵ Accordingly, the ED respectfully disagrees with the ALJ’s recommendation to approve all of TLU’s rate case expenses.

II. THE ALJ’S PFD DOES NOT CONFORM TO THE REQUIREMENTS OF THE TEXAS WATER CODE OR THE TCEQ RULES.

The ALJ’s PFD fails to follow the requirements of the Texas Water Code and the TCEQ rules by inappropriately placing the burden of proof on the Executive Director, misstating the evidence presented in this proceeding, and eliminating the statutorily required public interest element from consideration of the proper amount of recoverable

¹ TCEQ Agenda, Item No. 1, approximately minute 47 of video, Feb. 10, 2010.

² Tr. 736:21-737:2 (Sheresia Perryman).

³ TCEQ Agenda, Item No. 1, Feb. 10, 2010; *See also* Tr. 736:21-737:2 (Sheresia Perryman).

⁴ For example, in the *Aqua Texas* case the presiding ALJs stated “... it should be noted that the ED presented the only witness (Elsie Pascua) to controvert any of Aqua Texas’ rate case expense testimony.” *Aqua Texas* PFD at 65; *In re Application of Aqua Utilities, Inc. and Aqua Development Company d/b/a Aqua Texas, Inc. to Change Water and Sewer Rates*, SOAH Dockets 582-05-2770 and 582-05-2771. Ms. Pascua is the ED’s accountant who presented evidence on rate case expenses, including attorney’s fees and consultant fees. The ALJs found that the ED’s expert witness was credible. *Aqua Texas* PFD at 72. In all of the water rate cases the ED’s accountant’s expert testimony has been relied upon by the ALJs and accepted by the Commission. *See also, In re Applications of Southern Water Corporation for a Water and Sewer Rate/Tariff Change*; TCEQ Docket Nos. 2008-1830-UCR & 2008-1811-UCR; SOAH Docket Nos. 582-09-2068 & 582-09-2069; *In re Application of WaterCo, Inc. to change Water Rates in Trinity and Walker Counties*; TCEQ Docket No. 2004-0630-UCR; SOAH Docket No. 582-04-6463.

⁵ *Supp. Direct Testimony of Sheresia Perryman* at 10:12-13.

rate case expenses. Accordingly, the ED respectfully recommends that the Commission *not* adopt the PFD and proposed order, and instead revise its findings consistent with the ED's following exceptions:

A. The ALJ inappropriately places the burden of proof on the Executive Director.

The ALJ's PFD wrongly shifts the burden of proof away from the Applicant and onto the Executive Director, and the other parties, to prove that TLU's rate case expense are not reasonable and not necessary. In fact, the ALJ states that due to his decision that the ED did not prevail in this case, he finds that TLU's rate case expenses are reasonable and necessary.⁶ As that statement indicates, the ALJ erroneously placed the burden of proof on the Executive Director.

The Texas Water Code and the Commission's rules clearly place the burden of proof on the utility to prove that its rate case expenses are reasonable, necessary, and in the public interest.⁷ Section 13.184(c) of the Water Code states that "in any proceeding involving any proposed change in rates, the burden of proof shall be on the utility to show that the proposed change... is just and reasonable."⁸ The Commission's rules make clear that a surcharge, including a rate case expense surcharge, "is an authorized *rate* to collect revenue over and above the usual cost of service."⁹ Therefore, the utility bears the burden of proof to substantiate that rate. Furthermore, Section 291.12 of the Commission's rules repeats the Water Code's mandate and adds that in any other proceeding, the burden of proof is on the moving party.¹⁰ TLU is the moving party in this case by requesting the rate case expense surcharge. Accordingly, pursuant to Section 291.28(7) of the TCEQ rules, TLU has the burden to prove that its rate case expenses are reasonable, necessary, and in the public interest.¹¹ That burden never shifts to the other parties.¹²

It is fundamental to the principles of law that the party with the burden of proof must present sufficient evidence to satisfy that burden. The ALJ's PFD fails to cite to any evidence which substantiates TLU's excessive amount of rate case expenses. The

⁶ PFD at 23.

⁷ 30 TEX. ADMIN. CODE § 291.28(7)

⁸ TEX. WATER CODE § 13.184(c)

⁹ 30 TEX. ADMIN. CODE § 291.21(k)(1) (emphasis added)

¹⁰ 30 TEX. ADMIN. CODE § 291.12

¹¹ 30 TEX. ADMIN. CODE § 291.28(7)

¹² *Grieger v. Vega*, 271 S.W.2d 85, 90 (Tex. 1954).

ALJ's bullet points listed in the PFD as support for TLU's rate case expenses are broad generalizations and conclusory statements made by the Applicant that do not provide justification for the reasonableness or necessity of the tasks that were performed.¹³ TLU merely submitted general invoices and provided conclusory statements that their work was reasonable. However, the evidentiary record completely lacks any evidence or explanation that justifies the reasonableness or necessity of TLU's attorneys and consultant billing 1,136.56 hours¹⁴ for a standard rate case which did not involve any arguments on TLU's cost of service; and included issues which had no bearing on the rates TLU proposed to charge.¹⁵ Moreover, the Applicant only alleged that TLU's attorneys' and consultant's hourly rates are reasonable and that they have performed the work claimed in their invoices. However, merely reciting the hourly rate multiplied by the time spent does not prove the reasonableness or necessity of the total amount of rate case expenses. Testimony of hourly rates alone is insufficient to support a total fee award that is unreasonable.

Despite TLU's failure to present sufficient evidence to satisfy its burden, the ALJ not only shifts the burden to the ED, but places an even higher burden on the ED by requiring Ms. Perryman to prove specific information that is only within the knowledge of the Applicant. For example, when discussing Ms. Perryman's adjustments to the overlap of expenses in TLU's attorneys' invoices, the ALJ states that he was looking for evidence from the ED which addressed the issues that were discussed in TLU's attorneys' phone conversations, their complexity, the factors involved in the firm's decision to include a second attorney, or whether two attorneys were involved in one or two different telephone conferences.¹⁶ Furthermore, when referring to Ms. Perryman's adjustments to the expenses incurred for TLU's accountant to accompany the TCEQ engineer on a field inspection, the ALJ states that the ED should have presented evidence on which facilities were inspected, and what Mr. Morgan gained or failed to gain by the inspection.¹⁷ Moreover, when discussing Ms. Perryman's disallowance of the expenses incurred for TLU's attorney to tour the water system, the ALJ states that "although accompanying a TCEQ engineer on a field inspection might be unnecessary in

¹³ PFD at 12-14.

¹⁴ Ex. TLU-49 & TLU-50; The Terrill Firm billed 919.25 hours and Mr. Morgan billed 217.31 hours.

¹⁵ *Add. Direct Testimony of Paul Terrill* at 14:2.

¹⁶ PFD at 19.

¹⁷ PFD at 17.

some instances, the ED did not show why that was true in this case.”¹⁸ This is the type of evidence that TLU should have presented to prove why its rate case expenses are reasonable, necessary, and in the public interest. TLU is the only party in this case who has access to that kind of information. That is why the Water Code and the TCEQ rules place the burden of proof on the utility. TLU failed to provide any evidence, which the ALJ erroneously requires of the ED, to explain the reasonableness or necessity of the tasks performed by TLU’s attorneys and consultant. It is TLU who failed to present testimony on the reasonableness and necessity of the issues that were discussed, their complexity and the factors involved in the firm’s decisions. TLU failed to present evidence regarding what Mr. Morgan gained or failed to gain by touring the water system; and TLU failed to provide evidence as to why it was reasonable to charge the ratepayers for TLU’s attorney to tour the water system. It is not the ED’s burden to prove why TLU’s rate case expenses are not reasonable and necessary. Even SOAH’s own burden of proof rule considers the parties’ relative access to and control over the information pertinent to the merits of the case, and whether a party would be required to prove a negative, in order to determine who has the burden to present such evidence.¹⁹ It is clear that TLU should have presented testimony that justifies the amount of rate case expenses incurred based on the tasks performed. Merely introducing invoices and making self-interested conclusory statements does not tip the scales of justice in favor of the Applicant.

Even if conclusory statements could be considered to initially satisfy TLU’s burden, TLU cannot stand on its conclusory statements alone once Ms. Perryman presented specific evidence that TLU’s rate case expenses are excessive and unreasonable.²⁰ No TLU witness presented any testimony which contradicted Ms. Perryman’s specific adjustments to the rate case expenses. Although the ED filed his pre-filed testimony specifically rebutting TLU’s rate case expenses months before the evidentiary hearing, TLU failed to provide any testimony at the hearing to contradict Ms. Perryman’s adjustments. Therefore, there is no evidence which controverts Ms. Perryman’s testimony. The ALJ’s PFD overlooks that fact. Once the burden of proof is placed on the proper party, i.e. TLU, and reviewing the testimony presented by TLU for

¹⁸ PFD at 19-20.

¹⁹ 30 TEX. ADMIN. CODE § 155.427

²⁰ *Producers’ Oil Co. v. State*, 213 S.W. 349, 353 (Tex. Civ. App. 1919) (discussing that a plaintiff cannot stand on its initial prima facie showing once the defendant presented contradictory evidence).

the type of evidence the ALJ requires of the ED, it is evident that TLU did not satisfy its burden of proof.

Therefore, the ED recommends that the Commissioners not adopt the PFD or proposed order, as it relates to the rate case expense issue, due to the PFD's inappropriate placement of the burden of proof on the Executive Director.

B. The ALJ's PFD wrongly asserts that the ED did not contradict TLU's testimony regarding the reasonableness of TLU's rate case expenses.

The ALJ misstates the evidence presented in this proceeding. The most conspicuous misstatement of the evidence is the ALJ's assertion that the ED did not contradict TLU's testimony. The ALJ wrongly states that "the ED neither contradicted the testimony of TLU's witnesses nor showed that their testimony was unreasonable, incredible, or questionable."²¹ However, the evidentiary record unequivocally proves that the Executive Director presented a detailed analysis that contradicted specific expenses in TLU's invoices and established the unreasonableness of TLU's total amount of requested rate case expenses.²²

1. Overview of the Executive Director's Analysis.

The ALJ's PFD mistakenly assumes that the ED performed two separate, unrelated analyses to determine the reasonableness and necessity of TLU's claimed rate case expenses.²³ However, as the following summary of the ED's analysis demonstrates, Ms. Perryman conducted a single analysis which specifically analyzed TLU's rate case expenses in accordance with the Texas Water Code and the TCEQ rules.

Ms. Perryman began her analysis by reviewing TLU's rate case expense invoices for The Terrill Firm and Mr. Marvin Morgan.²⁴ Her line-by-line analysis of those invoices is what is typically done when reviewing rate case expenses.²⁵ After Ms. Perryman completed her adjustments based on the invoices, she disallowed \$40,756.38 as unnecessary expenses, leaving a remaining total of \$207,419.22 in rate cases expenses.²⁶ After considering the size, complexity, and number of issues involved in this

²¹ PFD at 20.

²² See, *Supp. Direct Testimony of Sheresia Perryman*; See also, Exs. ED-SP-14 & 15.

²³ PFD at 9.

²⁴ *Supp. Direct Testimony of Sheresia Perryman* at 4:8-10.

²⁵ Tr. 616:7-8 & 710:25-711:3 (Sheresia Perryman).

²⁶ *Supp. Direct Testimony of Sheresia Perryman* at 6:3-5.

case, Ms. Perryman determined that \$207,419.22 in rate case expenses was still excessive and unreasonable.²⁷ Therefore, in order to determine the reasonableness of the remaining portion of rate case expenses, Ms. Perryman reviewed prior similar rate cases in which the Commission approved rate case expenses. By reviewing the amount of rate case expenses that were approved in similar cases, Ms. Perryman was able to determine a baseline for what a reasonable amount of rate case expenses would be for a similar type of rate case. Her review found that the average amount of rate case expenses that have been approved by the Commission in similar cases over the last ten years is approximately \$52,000.²⁸ Using the \$52,000 average as a baseline for what is reasonable in similar types of rate cases, it is clear that \$207,419.22 is excessive and unreasonable. It is four times more than what the ED would expect to see in similar types of rate cases.²⁹ Accordingly, Ms. Perryman's recommendation used the \$52,000 as a baseline for what is reasonable. She concluded her analysis by reviewing the rate case expense invoices again in order to determine how much time TLU's attorneys and consultant spent on issues, which were presented by the Protestants, that are not normally part of a rate hearing.³⁰ Ms. Perryman determined that TLU incurred an extra \$8,756 in rate case expenses responding to issues that are not normally part of a rate proceeding.³¹ Therefore, after Ms. Perryman conducted her analysis, she determined that the total amount of reasonable and necessary rate case expenses that should be recovered by TLU is \$60,756.³²

2. The Executive Director conducted a line-by-line analysis of TLU's rate case expense invoices.

As the record demonstrates, Ms. Perryman performed a line-by-line review of the invoices submitted by TLU. TLU did not present any testimony justifying the reasonableness or necessity of the tasks performed in the invoices. Therefore, the only information Ms. Perryman had available were the very general descriptions of the tasks listed in the invoices.³³ TLU attempts to hide behind the general descriptions in its

²⁷ *Id.* at 6:7-10.

²⁸ *Id.* at 7:6-13.

²⁹ *Id.* at 8:20-22.

³⁰ *Supp. Direct Testimony of Sheresia Perryman* at 9:13-19.

³¹ *Id.*

³² *Id.* at 10:12-13.

³³ Tr. 652:25-653:2 (Sheresia Perryman).

invoices rather than providing sufficient evidence to prove the reasonableness and necessity of the tasks performed. Nevertheless, Ms. Perryman reviewed the invoices and made the necessary adjustments based on the information provided.

- a) The ED provided evidence which contradicted TLU's attorneys' invoices.

As discussed in the ED's Closing Arguments, Ms. Perryman presented evidence on specific adjustments to TLU's attorneys' invoices.³⁴ Ms. Perryman made adjustments to the Terrill Firm's invoices based on the duplicative and unnecessary work they performed.³⁵ TLU's invoices establish that more than one attorney billed for performing the same tasks.³⁶ No TLU witness provided any evidence explaining the reasonableness or necessity of the tasks performed. Furthermore, Ms. Perryman disallowed the expenses charged by TLU's attorneys for tasks they did not perform. For instance, the Applicant's invoices prove that TLU was billed for drafting exceptions and proposed corrections to the original proposal for decision four months before ALJ Smith even completed and filed the PFD.³⁷ It is unreasonable to charge for work that was not performed. Nevertheless, the ALJ's current PFD recommends recovery of those expenses. Moreover, Ms. Perryman made a reduction in the expenses incurred for the exorbitant amount of time TLU's attorney spent drafting its closing arguments. TLU's attorney spent approximately 106 hours drafting TLU's closing arguments at a cost of \$21,200.³⁸ As discussed below, that is almost half of the *total* amount of rate case expenses incurred in a typical rate case. After consulting with TCEQ staff attorneys³⁹, Ms. Perryman made an adjustment to the expenses incurred for the amount of time TLU

³⁴ See, *Supp. Direct Testimony of Sheresia Perryman*; See also, Ex. ED-Sp-14.

³⁵ Ex. ED-SP-14; See also, *Supp. Direct Testimony of Sheresia Perryman* at 5:7-15.

³⁶ For example, on March 2, 2009, Mr. Kirshbaum billed 0.75 hours for a task which included "draft and revise settlement offer..." Ex. TLU-49, bates labeled pg. 002586. However, on the same day, Mr. Terrill also billed 0.75 hours for "Draft and revise settlement offer..." *Id.* Additionally, on August 14, 2009, Mr. Kirshbaum billed 5.5 hours for tasks which included "Draft, revise, and file Reply to Closing Argument..." *Id.* at bates labeled pg. 002605. Likewise, on that same day, Mr. Terrill also billed 1.75 hours for "Draft, revise and file Reply to Closing Argument." *Id.* at bates labeled pg. 002606. These are just a few examples of the duplicated work claimed in TLU's rate case expenses.

³⁷ Ex. TLU-49, bates labeled pg. 002601. The original PFD was submitted Nov. 24, 2009.

³⁸ Ex. TLU-49, bates labeled pgs. 002598-002602. Mr. Kirshbaum's hourly rate when drafting closing arguments was \$200 per hour. Accordingly, \$200 x 106 = \$21,200.

³⁹ Tr. 730:18-23 (Sheresia Perryman).

spent drafting it closing arguments because it was not necessary and not reasonable, especially for a case which did not involve any arguments on TLU's cost of service.⁴⁰

The ALJ's PFD also insinuates that the ED should not reduce the attorney's expenses based on performing tasks that were not requested by the ALJ.⁴¹ However, the ED's concern relates to the unnecessary legal services performed which will be paid for by the ratepayers. For example, TLU incurred over \$1,500 in expenses for TLU's attorney to draft findings of fact and conclusions of law that were not requested by ALJ Smith.⁴² It is not appropriate to expect the ratepayers of TLU to pay for the utility's attorney's drafting of unnecessary documents. In fact, after being specifically asked by the Protestants if findings of fact and conclusions of law should be provided, ALJ Smith did not request the parties to do so. TLU bears the burden to prove why the expenses it incurred are reasonable and necessary. No TLU witness provided any evidence to prove why drafting findings of fact and conclusions of law, and expecting the ratepayers to pay for it, is reasonable when the ALJ did not request them. In other words, TLU failed to support the rate case expenses it incurred. The ALJ's PFD cites to no evidence which substantiates TLU's expense.

Furthermore, even though the ALJ acknowledges that accompanying the TCEQ engineer on a field inspection is unnecessary in some instances, the ALJ requires the ED to provide evidence as to why it was not necessary in this case.⁴³ However, as previously discussed, it is TLU's burden of proof to show why it was necessary for TLU's attorney to tour the system. Ms. Perryman reduced TLU's expenses because TLU failed to provide any evidence justifying that expense. It is not necessary or advantageous for an attorney to tour a water system in order to provide legal representation in a rate proceeding. It is even more unreasonable to expect the ratepayers of TLU to fund that expense. TLU's attorney billed approximately five hours⁴⁴ at a cost of \$1,000 for needlessly accompanying the TCEQ Staff engineer on his inspection of the system.⁴⁵ No TLU witness provided any evidence, and the ALJ's PFD cites to none, which demonstrate the necessity for TLU's attorney to tour the facilities.

⁴⁰ *Supp. Direct Testimony of Sheresia Perryman* at 4:22 – 5:3 & 7:23-8:4; *See also*, Ex. ED-SP-14, Pg. 10.

⁴¹ PFD at 19.

⁴² Ex. TLU-49, Bates pg. 002605-002606. Mr. Kirshbaum and Ms. Figg billed approximately 10.5 hours preparing this unnecessary document.

⁴³ PFD at 19-20.

⁴⁴ Tr. 657:14-15 (Sheresia Perryman).

⁴⁵ Tr. 791:24-792:1 (Kamal Adhikari).

These adjustments are just some of the reductions that Ms. Perryman presented in her testimony due to TLU's failure to provide evidence which justifies its expenses.⁴⁶ Contrary to the ALJ's assertions, the evidentiary record establishes that the ED provided testimony specifically contradicting TLU's testimony regarding the reasonableness and necessity of the expenses incurred based on the tasks performed. The ALJ's PFD improperly requires the ED to prove details of the tasks listed in TLU's invoices, despite TLU's failure to provide such evidence. TLU cannot conceal its unreasonable and unnecessary expenses behind paper invoices without justifying those expenses. If the record is not clear regarding the reasonableness of what tasks were performed or the amount of time spent on those tasks, it is a failure by the Applicant to satisfy its burden of proof to present sufficient evidence to substantiate its claims. As with any unsupported expense of a utility, the proper remedy is to disallow the expense. The burden does not shift to the Executive Director to prove the reasonableness or necessity of TLU's tasks. The ALJ's PFD fails to provide any legal analysis regarding the evidence provided by TLU that established the reasonableness of the expenses incurred for the tasks performed by TLU's witnesses.

Furthermore, the ALJ appears to give less weight to the ED's testimony than other witnesses because Ms. Perryman is not an attorney.⁴⁷ Yet the ALJ relies on Mr. Loy's testimony even though he is not an attorney and has no legal training.⁴⁸ The ALJ attempts to reconcile that discrepancy by stating that Mr. Loy presented objective standards on which he relied to determine the reasonableness of TLU's rate case expenses.⁴⁹ Mr. Loy's testimony merely states alleged factors that he considered, such as travel per diem, out-of-pocket expenses, and whether a witness worked more than 12 hours in a day.⁵⁰ Mr. Loy's factors have nothing to do with determining the reasonableness or necessity of the tasks performed. The travel expenses and out-of-pocket expenses were not challenged by the Executive Director; and it does not matter how many hours a day TLU's attorneys worked if they performed unreasonable and unnecessary tasks during that time. Mr. Loy provided no evidence, and the ALJ cites to none, regarding the reasonableness of the specific tasks performed by TLU's attorneys

⁴⁶ For a full explanation of the ED's adjustments to the legal fees, see Exhibit ED-SP-14.

⁴⁷ PFD at 21.

⁴⁸ PFD at 20; Tr. 583:21-22 (Charles Loy).

⁴⁹ PFD at 14 & 20.

⁵⁰ PFD 14-15.

and consultant. Conversely, Ms. Perryman analyzed the specific tasks performed and provided testimony regarding the unreasonable and unnecessary rate case expenses incurred by TLU. In Ms. Perryman's eight-year tenure at the TCEQ, she gained knowledge and experience regarding how much a utility should pay and normally pays for rate case representation. Ms. Perryman's review specifically analyzed TLU's rate case expenses in accordance with the Texas Water Code and the TCEQ rules. Ms. Perryman's testimony is the same type of evidence that has always been provided by the Executive Director and accepted by SOAH, and the Commission, in water utility rate cases.⁵¹

Moreover, the ALJ wrongly states that Ms. Perryman testified that no attorney had evaluated her recommended deductions relating to the attorneys' expenses.⁵² However, as the evidentiary record reflects, Ms. Perryman specifically testified during the hearing that she consulted with staff attorneys to assist her with the determination as to what was a reasonable amount of time to spend on particular issues and pleadings.⁵³ Therefore, staff attorneys did assist Ms. Perryman with her adjustments. The ALJ acknowledges in his PFD that it is reasonable for Ms. Perryman to rely on a lawyer's opinion in reaching her expert conclusions about reasonableness and necessity.⁵⁴ Therefore, the evidence in the record supports Ms. Perryman's testimony regarding the unreasonable and unnecessary rate case expenses incurred by TLU.

- b) The ED provided evidence which contradicted TLU's accountant's invoices.

The ALJ also alleges that Mr. Morgan's invoices were not rebutted by the ED.⁵⁵ However, Ms. Perryman presented testimony specifically contradicting the reasonableness and necessity of several of Mr. Morgan's claimed expenses in his invoices.⁵⁶ TLU incurred over \$1,100 in rate case expenses attributed to Mr. Morgan

⁵¹ See, *In re Application of Aqua Utilities, Inc. and Aqua Development Company d/b/a Aqua Texas, Inc. to Change Water and Sewer Rates*, SOAH Dockets 582-05-2770 and 582-05-2771.; *In re Applications of Southern Water Corporation for a Water and Sewer Rate/Tariff Change*; TCEQ Docket Nos. 2008-1830-UCR & 2008-1811-UCR; SOAH Docket Nos. 582-09-2068 & 582-09-2069; *In re Application of WaterCo, Inc. to change Water Rates in Trinity and Walker Counties*; TCEQ Docket No. 2004-0630-UCR; SOAH Docket No. 582-04-6463.

⁵² PFD at 11. The ALJ's cite does not support his statement. The ALJ's cite refers to Ms. Perryman acknowledging she is not an attorney, not that no attorney reviewed her deductions.

⁵³ Tr. 730:18-23 (Sheresia Perryman).

⁵⁴ PFD at 17.

⁵⁵ PFD at 16.

⁵⁶ See, Ex. ED-SP-15

correcting TLU's mistakes in its rate application.⁵⁷ Section 291.25(b) of the TCEQ rules requires the Applicant to be prepared to go forward at the hearing on the data which has been submitted in its rate change application.⁵⁸ Therefore, the Applicant is responsible for submitting a complete and accurate rate application at the time the application is initially filed with the TCEQ. It is not appropriate, and not necessary, for the ratepayers to bear the burden of paying for TLU's consultant to make corrections to an inaccurate application after it was filed. Had the Applicant submitted an accurate application, there would have been no need for the extra expenses incurred by TLU to correct the application. Accordingly, Ms. Perryman appropriately deducted that amount from TLU's expenses.

Furthermore, Ms. Perryman made adjustments to the \$1,750 in unnecessary expenses incurred for TLU's accountant to accompany the TCEQ engineer on the field inspection of TLU's facilities.⁵⁹ The ALJ erroneously places the burden on the ED to prove why it was not reasonable and necessary for Mr. Morgan to accompany the TCEQ engineer and what Mr. Morgan gain or failed to gain by doing so.⁶⁰ However, it is TLU that should have provided evidence as to why it was reasonable and necessary for its accountant to accompany the TCEQ engineer on his inspection. No TLU witness provided any evidence, and the ALJ's PFD cites to none, which supports these expenses.

3. The Executive Director's analysis established the unreasonableness of TLU's rate case expenses.

The ALJ's PFD states that the ED did not present evidence which tends to show that TLU's testimony is unreasonable or questionable.⁶¹ However, even after the ED's line-by-line analysis was completed, Ms. Perryman presented evidence which established TLU's remaining rate case expenses are unreasonable and questionable. For example, TLU spent more in rate case expenses than the net worth of its water and sewer systems combined.⁶² Moreover, TLU spent more than four times its requested annual revenue increase on rate case expenses and approximately three times more than

⁵⁷ *Id.*

⁵⁸ 30 TEX. ADMIN. CODE § 291.25(b)

⁵⁹ Ex. ED-SP-15

⁶⁰ PFD at 17.

⁶¹ PFD at 20.

⁶² Ex. TLU-24. At the February 10, 2010 Agenda, the Commission approved TLU's net worth as \$213,926. See, ED-KA-1 & ED-KA-2.

the cost of service TLU originally requested for its water systems.⁶³ Even more disconcerting is that after the main portion of the case was over, TLU spent an additional \$105,860.79 in post-hearing rate case expenses for drafting only four documents and appearing at agenda. That amount is more than two times the amount of the *total* rate case expenses that are incurred in a typical rate case. These general observations alone question the reasonableness of TLU's excessive rate case expenses. Nevertheless, Ms. Perryman continued her analysis and reviewed all similar rate cases within the last ten years in order to determine a benchmark for what amount of rate case expenses is reasonable for this type of case.

The ALJ recognizes that an average is an appropriate standard to use in determining the reasonableness and necessity of rate case expenses.⁶⁴ Nevertheless, the ALJ discounts Ms. Perryman's review of other similar rate cases to determine reasonableness because he claims the methodology is "simple."⁶⁵ However, determining a benchmark for reasonableness does not have to be complicated in order to be accurate. Reviewing prior similar cases is the most accurate and reliable method in order to obtain a reference point for what amount of rate cases expenses is reasonably incurred in a typical rate case.

The ALJ questions Ms. Perryman's selection criteria for determining what prior cases are similar to this case. The ALJ claims that the selection criteria that Ms. Perryman did not use might have affected the average amount of professional fees incurred by an applicant.⁶⁶ The ALJ's assertion is based on his assumption that there were other similar cases not considered in which the Commission approved rate case expenses. However, as the record clearly demonstrates, the ED used *all* of the similar rate cases over the last ten years in order to determine what amount of rate case expenses is typically incurred in a standard rate case.⁶⁷ In the last ten years, there have been only six rate cases in which the Commission approved the recovery of rate case expenses. Ms. Perryman's review established that four of those prior rate cases are similar to this case.⁶⁸ The other two rate cases are non-standard rate cases which

⁶³ *Supp. Direct Testimony of Sheresia Perryman* at 3:21 – 4:6.

⁶⁴ PFD at 21.

⁶⁵ PFD at 22.

⁶⁶ *Id.*

⁶⁷ *Supp. Direct Testimony of Sheresia Perryman* at 6:14-7:4.

⁶⁸ Those cases are *North Orange Water & Sewer, L.L.C., Quadvest, Inc., WaterCo Inc., and Southern Water Corporation*. See, *Supp. Direct Testimony of Sheresia Perryman* at 6:14-8:4.

involved hundreds of utility systems across the state and multiple appeals to the rate making actions of several municipalities.⁶⁹ No prior similar rate case within the last ten years was excluded from Ms. Perryman's analysis. To ensure that the four cases are typical rate cases and similar to the case at bar, Ms. Perryman reviewed each case to determine the number, type, and complexity of the issues involved and whether the utility hired an attorney and consultant.⁷⁰ Ms. Perryman's review established that each of the prior similar rate cases involved more issues than were involved in this case and that each utility hired at least one attorney and one consultant.⁷¹ The average amount of rate case expenses approved by the Commission in these similar rate cases is approximately \$52,000.⁷² Ms. Perryman testified that since the similar cases involved more issues than this case, and each were represented by attorneys and consultants, she would expect to see TLU's rate case expenses closer to the average amount of approximately \$52,000.⁷³ Instead, TLU's rate case expenses are four times more than what the ED would expect to see in this type of rate case.⁷⁴ Therefore, the ED's testimony presented probative evidence which establishes that TLU's total amount of rate case expenses are excessive and unreasonable when compared to what is customarily charged in similar rate cases. Accordingly, the ED recommends that the Commissioners not adopt the ALJ's PFD as it relates to rate case expenses.

C. The ALJ's PFD inappropriately eliminates the public interest element when determining the appropriate amount of recoverable rate case expenses.

The Texas Water Code and the TCEQ rules state that a utility may only recover rate case expenses if the expenses are reasonable, necessary, *and in the public interest*.⁷⁵ The ALJ acknowledges that the significant disparity between TLU's requested rate case expenses and its proposed revenues raises a public interest concern.⁷⁶ Yet the ALJ's interpretation of the public interest element renders that element completely

⁶⁹ Those two cases are *AquaSource* (TCEQ Docket No. 2000-1074-UCR) and *Aqua Texas* (TCEQ Docket No. 2004-1671-UCR). The Commission order in the *AquaSource* case states that "[t]his order shall not be construed as containing any finding concerning the reasonableness or necessity of the rate case expenses of [*AquaSource*]..." Exhibit TLU-71 at 9. The *Aqua Texas* PFD expressly states that the *Aqua Texas* rate case "is more complex than a typical rate case..." and "is different from a standard rate case..." *Aqua Texas* PFD at 50.

⁷⁰ *Supp. Direct Testimony of Sheresia Perryman* at 7:15 – 8:4.

⁷¹ *Id.* at 7:20 – 8:4.

⁷² *Id.* at 7:6-13.

⁷³ *Id.* at 8:14-23.

⁷⁴ *Id.* at 8:17-23.

⁷⁵ Tex. Water Code § 13.185(h)(3); 30 TEX. ADMIN. CODE § 291.28(7) (emphasis added)

⁷⁶ PFD at 23.

meaningless. The ALJ states that because he finds TLU's expenses to be reasonable and necessary, the Commission should adopt them as being in the public interest.⁷⁷ However, the ALJ's statement is contrary to Texas law. The Texas Code Construction Act states that when construing statutes, it is presumed that the Texas Legislature intended the entire statute to be effective.⁷⁸ The Texas Supreme Court has stated that "every word in a statute is presumed to have been used for a purpose; and a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible."⁷⁹ The ALJ's PFD gives no effect or meaning to the public interest element in the Texas Water Code and the TCEQ rules. In order to give full force and effect to the consideration of the recoverable amount of rate case expense, each element (i.e. reasonable, necessary, and public interest) must be given separate meaning and analyzed accordingly. The ALJ's PFD nullifies the public interest element and essentially removes the public interest from consideration. Therefore, the ALJ's PFD does not appropriately consider the public interest element.

Furthermore, the ALJ completely ignores the Public Interest Counsel's (OPIC) interpretation of the public interest element. In its Closing Argument, the Public Interest Counsel stated that the public interest element relates to the reasonable access to the ratemaking process.⁸⁰ OPIC further states that

The public interest clause is meant to protect against the type of disproportion of fees compared to actual rate increases sought in this case. Where a policy of proportionality is enforced, utilities will adjust their litigation strategies accordingly; where a blank check is instead conferred on a utility to accrue fees unconstrained, the results can run afoul of the greater public good.⁸¹

The Executive Director concurs with the Public Interest Counsel's interpretation. A utility must strike a balance between its right to hire representation and its responsibility to be efficient with its expenses that are going to be recovered from the ratepayers. The public interest is considered when determining rate case expenses to

⁷⁷ PFD at 26.

⁷⁸ TEX. GOV'T CODE § 311.021.

⁷⁹ *Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (quoting *Perkins v. State*, 367 S.W.2d 140, 146 (Tex.1963)); See also, *Bexar Metropolitan Water Dist. v. Texas Comm'n on Environmental Quality*, 185 S.W.3d 546 (Tex. App.—Austin 2006).

⁸⁰ OPIC Closing Argument at 5.

⁸¹ *Id.*

ensure that balance is accomplished. If a utility is allowed to recover such excessive rate case expenses, it will inhibit ratepayers from protesting rate applications, effectively denying them access to the ratemaking process. TLU is seeking to recover approximately one-quarter of a million dollars in rate case expenses to obtain a revenue increase of only \$61,051.⁸² Such an astronomical disparity between TLU's rate case expenses and its revenue increase invokes a public interest violation. Once the public interest element is given meaning and effect, it is clear that TLU's recovery of its entire amount of rate case expenses is not in the public interest. The ED's testimony established that \$60,756 in rate case expenses is the amount that is considered to be in the public interest. Accordingly, the ED recommends that the Commissioners not adopt the ALJ's PFD as it relates to rate case expenses, because it inappropriately eliminates, and thus, does not consider the public interest element when determining the appropriate amount of recoverable rate case expenses.

D. The Texas Disciplinary Rules of Professional Conduct factors do not consider all of the elements required pursuant to the Texas Water Code and TCEQ rules when determining the amount of recoverable rate case expenses.

The ALJ states that the reasonableness of attorney's fees should be determined by reviewing the factors listed in Texas Disciplinary Rules of Professional Conduct (TDRPC).⁸³ However, Texas courts have stated that other factors may be considered in addition to, or instead of, the TDRPC factors.⁸⁴ The ALJ fails to provide any analysis of how TLU allegedly satisfied its burden of proof based on the TDRPC factors or any other factors. Moreover, even though the ALJ acknowledges that the ED provided legal argument relating Ms. Perryman's evidence to the TDRPC factors⁸⁵, the ALJ still erroneously states that the ED did not provide testimony on the TDRPC factors or any similar factors.⁸⁶

⁸² Ex. TLU-1 at 002087.

⁸³ PFD at 6.

⁸⁴ *City of El Paso v. Pub. Util. Comm'n*, 916 S.W.2d 515, 522 (Tex. App. – Austin 1995); *See also, Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 897-98 (Tex. App. – Dallas 2003, no pet.).

⁸⁵ In Footnote 76 of the PFD, the ALJ acknowledges that the ED provided legal argument relating Ms. Perryman's evidence to the *Arthur Andersen*/TDRPC factors. However, the ALJ failed to explain why he did not review the evidence presented. All of the facts necessary to prove the unreasonableness of TLU's rate case expenses were presented at the hearing. Ms. Perryman does not have to testify to the legal argument involved in reviewing that evidence in light of the TDRPC factors.

⁸⁶ PFD at 19.

First, the ED has never endorsed the use of the TDRPC factors for purposes of analyzing the reasonableness of rate case expenses in a retail public utility proceeding. The ED does not propose that these rules be adopted as the standard for reviewing rate case expenses. The TDRPC factors do not evaluate all of the elements required pursuant to Texas Water Code Section 13.185(h) or TCEQ rule Section 291.28(7). Specifically, the TDRPC factors do not address whether the rate case expenses incurred are necessary or in the public interest. The TDRPC factors only focus on the reasonableness of the attorney's fee at the inception of the attorney/client relationship, and fail to consider the total amount of rate case expenses incurred.

Second, contrary to the ALJ's assertion, Ms. Perryman testified that her analysis considered the principles behind the TDRPC factors, along with other similar factors, when she determined the appropriate amount of recoverable rate case expenses.⁸⁷ In fact, Ms. Perryman's testimony and review of TLU's excessive rate case expenses specifically included the complexity of the issues involved⁸⁸, time and labor required litigating the case⁸⁹, the skill required to handle this case⁹⁰, and the amount of total rate case expenses that are customarily charged in similar rate cases.⁹¹ Therefore, even though Ms. Perryman's testimony did not specifically mention the TDRCP factors, Ms. Perryman's analysis included the same principles.

Furthermore, in determining reasonableness of rate case expenses the court can also look at the entire record, the evidence presented on reasonableness, and the amount in controversy.⁹² Ms. Perryman's testimony provided substantial evidence regarding the unreasonableness of TLU's rate case expenses based on prior similar cases and the enormous disparity between TLU's rate case expenses and its requested increase in revenue. When considering the entire record, recovery of \$248,175.60 in rate case expenses to obtain a revenue increase of \$61,051, in a simple case in which the Applicant admits involved issues that had no bearing on the rate to be charged⁹³, is unreasonable.

⁸⁷ Tr. 606:18-20 & Tr. 736:3-6 (Sheresia Perryman).

⁸⁸ *Supp. Direct Testimony of Sheresia Perryman* at 8:6-12.

⁸⁹ Tr. 730:11-17 (Sheresia Perryman).

⁹⁰ *Supp. Direct Testimony of Sheresia Perryman* at 8:10-12.

⁹¹ *Supp. Direct Testimony of Sheresia Perryman* at 6:12-8:4.

⁹² *In re A.B.P.*, 291 S.W.3d 91, 98 (Tex. App.—Dallas 2009).

⁹³ *Add. Direct Testimony of Paul Terrill* at 14:2.

The ED’s Closing Arguments and Reply to Closing Arguments provided a detailed analysis of the evidence submitted based on the TDRPC factors.⁹⁴ If these factors are considered, it is clear that TLU’s total amount of rate case expenses is excessive and unreasonable. What is most compelling is that TLU spent approximately five times more in rate case expenses than what is customarily charged in similar types of rate cases. As Ms. Perryman testified, the amount of time and labor extended on this case by TLU far exceeded the amount that is reasonable.⁹⁵ That becomes more evident when considering the expertise of the Protestants that TLU faced. The Executive Director’s analysis considered all relevant factors⁹⁶ when determining that \$60,756 is the amount of TLU’s rate case expenses that are reasonable, necessary, and in the public interest. Therefore, the ED recommends that the Commission not adopt the ALJ’s PFD, and instead authorize TLU to recover \$60, 756 in rate case expenses.

E. Only the amount of rate case expenses that are found to be reasonable, necessary and in the public interest should be recovered through a surcharge.

The Executive Director disagrees with the ALJ’s recommendation of allowing TLU to recover all of its rate case expenses. As such, the ED also disagrees with the ALJ’s suggested monthly surcharge amount. The Executive Director recommends that TLU be allowed to recover \$60,756 in rate case expenses over the traditional two-year recovery period. Accordingly, the monthly surcharge amount would be \$9.48 per month, per connection.⁹⁷ However, if the Commissioners choose to extend the recovery period, the following table depicts the surcharge amount that would be necessary to recover the \$60,756 over an extended recovery period.

Recovery Period	Monthly Surcharge Amount Per Connection
2 years	\$9.48
3 years	\$6.32
4 years	\$4.74
5 years	\$3.79

⁹⁴ See, ED’s Closing Arguments at 20-26; See also, ED’s Reply to Closing Arguments at 20-26.

⁹⁵ Tr. 730:11-17 (Sheresia Perryman).

⁹⁶ Tr. 736:3-6 (Sheresia Perryman); See also, Tr. 606:18-21 (Sheresia Perryman).

⁹⁷ Supp. Direct Testimony of Sheresia Perryman at 11:5-7.

F. The ALJ inappropriately limits the issuance of refunds to be made in this case.

At the February 10, 2010 Agenda, the Commissioners approved a rate that is lower than TLU's proposed rate. Accordingly, the Commissioners ordered TLU to refund or credit all sums collected in excess of the rates approved by the Commission, plus 0.61% interest.⁹⁸ TLU has been collecting its proposed rates since November 26, 2007. The ratepayers are still being charged the proposed rate until a final order is issued from the Commission. Despite the ratepayers continually being charged the proposed rate, the ALJ arbitrarily stops the issuance of refunds in January 2010.⁹⁹ The ALJ provides no explanation in the PFD as to why he makes that recommendation. The ratepayers continue to pay the proposed rates and should be issued refunds over the same amount of time TLU collected a rate higher than what the Commission approved. Therefore, the ED recommends that TLU issue refunds or credit the ratepayers' bills for the excess amount of money from the time the proposed rate went into effect until the Commission issues its final order. Accordingly, the ED recommends that the Commissioners not adopt the ALJ's Finding of Fact No. 58 and Ordering Provision No. 2 as submitted, and instead revise those sections as follows:

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.

⁹⁸ See, Commission's February 10, 2010 Marked Agenda, Ex. TLU-47.

⁹⁹ PFD at 28.

III. CONCLUSION

A. Executive Director's recommendations

The Executive Director respectfully recommends that the Commissioners not adopt the ALJ's PFD and proposed order as it relates to the rate case expense issue, and instead issue an order consistent with the ED's Exceptions. Texas courts have held that a Commission has broad discretion to determine recovery of expenses in a ratemaking proceeding¹⁰⁰ and may reverse the recommendation of an administrative law judge on an issue.¹⁰¹ As discussed *supra*, the ALJ's PFD inappropriately shifts the burden of proof away from the Applicant and onto the ED, requiring the ED to bear the burden of presenting evidence that should have been presented by TLU. Furthermore, the PFD misstates the evidence provided during the hearing and fails to provide any legal analysis as to the expenses incurred base on the tasks performed by TLU. Additionally, the ALJ's PFD erroneously eliminates the statutorily required public interest element from consideration when determining the appropriate amount of recoverable rate case expenses. Therefore, the PFD does not conform to the requirements of the Texas Water Code or the TCEQ rules.

The Executive Director's analysis of TLU's recoverable amount of rate case expenses is in accordance with the Texas Water Code and the TCEQ rules. The ED provided a detailed analysis which established that TLU's requested amount of rate case expenses is unreasonable, unnecessary, and not in the public interest. The Executive Director's review of all the evidence established that the total amount of TLU's rate case expenses that are reasonable, necessary and in the public interest is \$60,756. Accordingly, the ED recommends that the Commission not adopt the ALJ's PFD, and instead issue an order authorizing recovery of the \$60,756 through a monthly surcharge on the customers' bills.

Furthermore, refunds should be made to the ratepayers for the entire time TLU has collected excess rates over and above what the Commission has approved.

¹⁰⁰ *Pioneer Natural Resources USA, Inc. v. Public Utility Comm'n of Texas*, 303 S.W.3d 363, 377 (Tex. App.—Austin 2009).

¹⁰¹ *Id.*; See also, TEX. GOV'T CODE § 2003.047(m).

B. Necessary revisions to the Proposed Findings of Fact and Conclusions of Law.

Upon authorizing TLU to recover \$60,756 in rate case expenses, several of the ALJ's proposed Findings of Fact and Conclusions of Law must be revised. The ED recommends that the Commissioners not adopt the ALJ's proposed Findings of Fact Nos. 54 – 57, and instead replace those findings with the following:

Finding of Fact No. 54:

TLU incurred \$60,756 in rate case expenses that have been found to be reasonable, necessary, and in the public interest for the preparation, filing, and litigation of its rate change application.

Finding of Fact No. 55:

Rate case expenses in this case were not a normal, recurring expense of TLU's operations.

Finding of Fact No. 56:

It is reasonable and appropriate for TLU to recover its rate case expenses, that were found to be reasonable, necessary and in the public interest, as a monthly surcharge in the amount of \$9.48 per connection, effective 45 days after this Order becomes final, and to remain in effect until TLU has recovered the total sum of its approved rate case expenses, which total \$60,756.

The ED also recommends that the Commissioners not adopt the ALJ's corresponding Conclusions of Law Nos. 16-18, and instead replace those conclusions with the following:

Conclusion of Law No. 16:

Rate case expenses in the amount of \$60,756 were reasonable, necessary and in the public interest within the meaning of TEX. WATER CODE § 13.185(d) and (h), and 30 TEX. ADMIN. CODE §§ 291.28(7) and 291.31(b).

Conclusion of Law No. 17:

TLU may recover all rate case expenses that were found to be reasonable, necessary and in the public interest, through a monthly surcharge of \$9.48 per connection until TLU has recovered the total sum of its approved rate case expenses, which total \$60,756. Recovery of rate case expenses through such a surcharge complies with 30 TEX. ADMIN. CODE § 291.21(k) for collection of revenues over and above the usual cost of service.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.

Executive Director

Robert Martinez, Director

Environmental Law Division

By  _____

Ron M. Olson, Staff Attorney

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2011, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the persons on the attached Mailing List.

A handwritten signature in black ink, appearing to read "Ron Olson". The signature is stylized with a large "R" and "O".

Ron Olson, Staff Attorney
Environmental Law Division

Mailing List

Application of Texas Landing Utilities
to change its water and sewer rates/tariff under
CCN Nos. 11997 and 20569 in Polk and Montgomery Counties

SOAH Docket No. 582-08-1023
TCEQ Docket No. 2007-1867-UCR

FOR SOAH:

Honorable Paul Keeper
Administrative Law Judge
State Office of Administrative Hearings
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Austin, Texas 78711-0325
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Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 14, 2009

Ms. LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Re: Application of Texas Landing Utilities to change its water and sewer rates/tariff under CCN Nos. 11997 and 20569 in Polk and Montgomery Counties. SOAH Docket No. 582-08-1023; TCEQ Docket No. 2007-1867-UCR.

Dear Ms. Castañuela:

Enclosed for filing with the Texas Commission on Environmental Quality is the original plus seven copies of "The Executive Director's Exceptions to the Proposed Order" for the above referenced matter.

If you have any questions, please call me at (512) 239-0608.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron" followed by a stylized surname.

Ron M. Olson
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

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

APPLICATION OF TEXAS LANDING UTILITIES FOR A WATER RATE/TARIFF CHANGE, CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11997 IN POLK AND MONTGOMERY COUNTIES; AND FOR A SEWER RATE/TARIFF CHANGE, CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 20569 IN POLK AND MONTGOMERY COUNTIES

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BEFORE THE TEXAS COMMISSION

ON

ENVIRONMENTAL QUALITY

THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSED ORDER

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files the Executive Director's Exceptions to the Proposed Order in the above captioned matter.

The Executive Director agrees with the Administrative Law Judge's (ALJ) Proposal for Decision (PFD). The ALJ's PFD is well-reasoned, follows the law, and recommends appropriate adjustments based on the evidence presented during the hearing on the merits. The ED's exceptions address only two minor typographical corrections in the ALJ's proposed order.

I. Clarification of ALJ's Proposed Finding of Fact No. 28

The ALJ stated in her proposed Finding of Fact number 28 that Texas Landing Utilities' (TLU) tariff will promote water conservation by including a gallonage charge of \$2.42. However, in the PFD, the ALJ's recommended gallonage rate for water is \$2.36.¹ This coincides with Finding of Fact number 53, which also states that the gallonage charge for water should be \$2.36. Therefore, the ED recommends revising proposed Finding of Fact number 28 to reflect

¹ PFD, Section IV, Subsection D2, p. 28
Executive Director's Exceptions to Proposed Order

the correct gallonage rate for water as being \$2.36. Accordingly, the revised finding of fact would read:

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

II. Clarification of ALJ's Proposed Finding of Fact No. 46

In determining the amount of return for water, the ALJ stated in Finding of Fact number 46 that TLU's total invested capital is \$162,933. However, consistent with Finding of Fact number 37 and Exhibit C attached to the proposed order, TLU's total invested capital is \$162,935. Nevertheless, the stated amount of return, \$15,446, is correct. Therefore, the ED recommends revising proposed Finding of Fact number 46 to read:

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

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By 
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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2009, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the persons on the attached Mailing List.

A handwritten signature in black ink, appearing to read 'Ron Olson', with a horizontal line underneath it.

Ron Olson, Staff Attorney
Environmental Law Division

MAILING LIST

Application of Texas Landing Utilities
to change its water and sewer rates/tariff under
CCN Nos. 11997 and 20569 in Polk and Montgomery Counties

SOAH Docket No. 582-08-1023
TCEQ Docket No. 2007-1867-UCR

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