

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

December 14, 2009

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

Re: **TEXAS LANDING UTILITIES**
SOAH DOCKET NO. 582-08-1023
TCEQ DOCKET NO. 2007-1867-UCR

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing list

Enclosure

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\$142,314.81 of rate case expenses were accrued, which the honorable judge recommends the ratepayers bear via surcharge, this demonstration should have been quite clear. It was not.

The PFD mistakenly concludes that there is no legitimate dispute as to substantial similarity of facilities or quality of service, and mysteriously finds that, although no comparative cost of service evidence was introduced by the Applicant, TLU has still managed to meet their affirmative burden of demonstrating substantial similarity as to cost of service. OPIC disagrees. TLU has not met their burden, and OPIC urges that the honorable judge reconsider her opinion how an Applicant may meet the singular protection afforded ratepayers in the form of Applicant's §13.145(a) burden.

A. Facilities and Quality of Service

Chapter 311 of the Government Code is known as the Code Construction Act.² It applies to the Water Code and the Commission's rules adopted under the Water Code.³ Under the Code Construction Act, it is presumed that an entire statute is intended to be effective.⁴ If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given them both.⁵ If the conflict between the general provision and special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.⁶ Words and phrases in statutes and rules are to be read in

² Gov't Code §311.001.

³ Gov't Code §311.000(1) & (4).

⁴ Gov't Code §311.021(2).

⁵ Gov't Code §311.026(a).

⁶ Gov't Code §311.026(b).

context and construed according to common usage unless they have acquired a technical or particular meaning by legislative definition or otherwise.⁷ Moreover, in construing a statute, the following may be considered:

1. object sought to be attained;
2. circumstances under which the statute was enacted;
3. legislative history;
4. common law or former statutory provisions, including laws on the same or similar subjects;
5. consequences of a particular construction;
6. administrative construction of the statute; and
7. title (caption), preamble, and emergency provision.⁸

As stated, under Texas Water Code § 13.145(a) a utility may consolidate more than one system under a single tariff only if, *inter alia*, facilities and quality of service of each facility are substantially similar. A common utility owns all of the facilities involved in every case where consolidation is sought *ipso facto* due to the fact that a utility cannot seek a consolidated rate for systems which they do not own. Thus, those factors listed in the PFD that relate only to ownership, such as operation, management, and customer service, are simply not relevant to a showing of substantial similarity. Similarly, in all cases where consolidation is sought, the facilities involved are water systems comprised of water utility equipment. The mere existence of PVC pipes, pressure tanks, piping, and the use of chlorination do little to prove anything beyond the fact that what is being addressed is a water utility. Giving lopsided consideration to such factors renders the statutory requirement of "substantial similarity" of systems owned and operated by the same utility a tautology. Strong evidence was produced at

⁷ Gov't Code §311.026(b).

⁸ Gov't Code § 311.023

trial that supports a finding that the systems are not substantially similar, and in fact dissimilar.

Karen Mann, testifying on behalf of TLU, stated during cross examination that the lines used in the Texas Landing water system were 20-30 plus years old, as opposed to the relatively new lines present in the Goode City system, which has only been operational since June 2005. Ms. Mann also testified that the lines for the Texas Landing system lie in "gumbo mud," which tends to dry up in the summertime and "pull our pipes apart at the joints causing leaks,"⁹ though no such soil or problems exist in the Goode City system. These factors result in a disproportionately high line loss, 21%, for the Texas Landing System. The fact that one set of lines is aged and faces maintenance problems, coupled with the resultant line loss, speaks to a dissimilarity that overshadows the fact that piping merely exists in both systems.

Further, Mr. Sheffield testified that arsenic problems exist in the Texas Landing system, which he manages by "blending" the water from the well that exceeds compliance standards with wells that have no such arsenic problems within the same system. The Goode City utility does not have wells with elevated arsenic problems. This difference is substantial if one or more of the wells without elevated arsenic levels were to go out and the \$114,495.00 savings¹⁰ that Mr. Sheffield states he saved the ratepayers of Texas Landing utility come back to haunt not only customers of that utility, but the newly-regionalized rate payers of Goode City as well.

While it is true that TLU owns all of the facilities involved, and that those facilities provide water to residential customers, these facts are insufficient to overcome the dissimilarities involved in the respective systems. An aged system, wrought with line loss and impending

⁹ P. 125, lines 4-10.

¹⁰ Direct Testimony of David Sheffield, P. 20, line 7.

equipment replacement, operating with an arsenic-contaminated well, is not the same as a new facility with little line loss, no known arsenic issues, or recurring battles with the local geology.

B. Cost of Service

Cost of service is the amount of revenue required to cover the reasonable and necessary expenses incurred by the utility to provide water and sewer service to its customers and provide a fair and reasonable return on the invested capital needed to provide service. It is, in short, the very basis of the rate to which a utility is entitled. In a case involving regionalization, it is of utmost importance because it is the only way to ensure that one set of ratepayers is not subsidizing the costs of a system that is more expensive to run.

The honorable judge finds that this important burden in the instant case is “minimal,” based on the rationale that “no commission rules required TLU to provide the cost of service of each water system and because *Aqua Texas* was established precedent before TLU filed its case.” Respectfully, the exact same argument could have been made about the Applicant’s evidentiary burden in *Double Diamond*,¹¹ which the commissioners found the Applicant failed to meet. The utter nonexistence of evidence from TLU supporting substantially similarity of costs of service does not somehow meet the burden placed on TLU, nor does it surpass in clarity the relatively in-depth discussion adduced by *Double Diamond* in their hearing. Further, the insufficiency of TLPOA’s attempts to demonstrate disparity of cost of service does not somehow rehabilitate TLU’s evidentiary lapse. Substantial similarity of cost of service is not a burden placed on TLPOA. Nor is cost of service a surprise issue or ancillary issue—it was raised by TLPOA, and

¹¹ SOAH Docket No. 582-08-0698; TCEQ Docket No. 2007-1708-UCR; Application of Double Diamond Utilities, Inc. to Change its Water Rate and Tariff, in Hill, Palo Pinto, and Johnson Counties, Texas Application No. 35771-R.

even more importantly, it is an explicit statutory obligation.

The honorable judge states that the “only” attempt to attempt to draw a comparison between costs of service was made by TLPOA. In reaching the conclusion that the costs of service between the systems at issue are nonetheless substantially similar, the honorable judge gives great weight to factors that relate to common management such as employee benefits, IT systems, purchasing policies, and contracts for services and products. In a second theoretical step, the judge, *sua sponte*, combines the hypothetical costs of the Texas Landing Subdivision and Magnum systems with the hypothetical costs of the Goode City system. Such theoretical alignment produces a figure which “would likely be more similar, but (provides) insufficient information from which to derive a finding.”¹² This is not the stuff from which an affirmative statutory burden is satisfied, and evidence was produced at trial which, above and beyond, left some indication that cost of service may in fact be quite disparate across TLU’s systems.

The Texas Landing system serves an “established” subdivision that will generate little new tap revenue, whereas the Goode City system has only been in service since June 2005 and is serving a “new and growing subdivision.”¹³ Even assuming that the expenses will off-set each other on the books with the addition of depreciation expenses and tap revenue, that is not the inquiry before the court and not the correct standard to apply in determining whether a regional rate is appropriate. The statute clearly states that the systems must be substantially similar. This does not mean, as the Applicant suggests, that the systems are substantially similar over a period of years. The systems must be substantially similar during the course of the test year—indeed

¹² *Texas Landing Utilities*, PFD at 8.

¹³ Direct Testimony of Sheresia Perryman, P. 12, Lines 5-15.

that is the very point of having a test year that determines costs over a measurable period of time.

Furthermore, the Goode City and Texas Landing systems could not be more different in terms of age and connections. The Texas Landing system serves 138 connections, while the Goode City system serves only 14. As stated by Sheresia Perryman, the nearly twenty year-old Texas Landing system commands "repairs and maintenance expenses that are typically much greater than that of Goode City."¹⁴ The difference in these expenses are explained by reference to equalizing force of allowable depreciation, but depreciation is not a real cost, it is a book cost used to determine when a piece of equipment will near the end of its useful life. Thus, a difference in allowable depreciation is not an indicator of similarity, but rather of dissimilarity between old and new system components.

The preceding examples notwithstanding, the fact is that it is not OPIC's burden to prove that TLU's systems incur similar costs of service. That burden was TLU's alone. OPIC agrees that the passage quoted by the honorable judge from the Double Diamond PFD, which was adopted by the Commissioners, is analogous to the case at hand:

The ALJ appreciates the position of the McCartneys that the ratepayers at the Retreat may pay higher rates if the Commission requires different rates for the Retreat and White Bluff water systems. The Retreat is a relatively new development with few ratepayers paying the expenses of a system designed to serve more connections. Nonetheless, as pointed out by OPIC, by combining the Retreat and White Bluff water systems under one rate, an older, established development would be subsidizing the newer development. This would not result

¹⁴ Direct Testimony of Sheresia Perryman, P. 11, Lines 20-21.

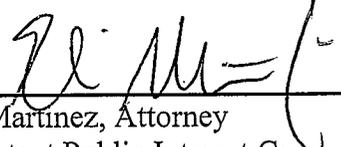
in water rates that are just and reasonable for the White Bluff ratepayers.¹⁵ Without the conclusive evidence required of TLU to demonstrate that such a disparity would not take place in the instant case, Applicant's §13.145(a) burden has not been met and they are statutorily prohibited from regionalization approval.

II. CONCLUSION

For the foregoing reasons, OPIC excepts to the honorable judges PFD and recommends denying TLU's request for a regional rate. Furthermore, OPIC excepts to the recoupment of any rate case expenses owing to TLU's failure to meet their statutory burden.

Respectfully submitted,

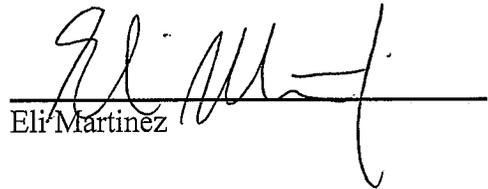
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¹⁵ *Double Diamond*, PFD at 19-20.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2009, the of the Office of Public Interest Counsel's Exceptions to Proposal for Decision was served upon Chief Clerk of the TCEQ and a copy was served upon all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Eli Martinez

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

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