

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 COUNTY, § OF  
APPLICATION NO. 35838-R AND §  
CERTIFICATE OF CONVENIENCE §  
AND NECESSITY NO. 20569 IN POLK §  
COUNTY, APPLICATION NO. 35840-R § ADMINISTRATIVE HEARINGS

**PROTESTANT TEXAS LANDING PROPERTY OWNERS’  
ASSOCIATION’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

Protestant, Texas Landing Property Owners’ Association (“TLPOA”) files the following Exceptions to the Administrative Law Judge’s (“ALJ”) proposal for decision (“PFD”). In support of its exceptions, TLPOA shows the following:

I. OVERVIEW

Texas Landing Utilities (“TLU”) has failed to show that the proposed rates and rate structure are just and reasonable. TLPOA has shown that this utility has sought to subsidize its owner’s cost of development through consolidating dissimilar utility systems and increasing the rates. The Protestants acknowledge that the Commission must fix a utility’s overall revenues at a level that “(1) will permit the utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public over and above its reasonable and necessary operating expenses; and (2) preserve the financial integrity of the utility.”<sup>1</sup> However, it is TLU’s responsibility and legal burden to show that its proposed rate increase is just and reasonable.<sup>2</sup> TLU may only consolidate more than one system if its systems are

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<sup>1</sup> Tex. Water Code § 13.183(a).

<sup>2</sup> *Id.* at § 13.184(c).

substantially similar in terms of facilities, quality of service, and cost of service.<sup>3</sup> Under the standards and principles established by the Commission in *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, 582-08-0698, TLU's application should be denied.

In *Double Diamond Utilities*, the ALJ agreed with the Protestants that "the differences in facilities used by the systems and differences in the cost of service, including differences in developer contributions, types of community served, the age of systems, and buildout of the developments"<sup>4</sup> prevented the utility from meeting its burden of proof to show that the systems meet the requirements for consolidation under one tariff and one rate design.<sup>5</sup> Further, in *Double Diamond Utilities*, the ALJ recognized that by combining the two systems under one rate, an older, established development would be subsidizing the newer developments.<sup>6</sup> "This would not result in water rates that are just and reasonable for the [older system] ratepayers."<sup>7</sup> In sum, Protestants ask that the Texas Commission on Environmental Quality sustain the exceptions set forth below, and deny the applicant's request for a rate increase.

## II. EXCEPTIONS

### A. Finding of Fact 23

The ALJ found that TLU's water system facilities are substantially similar based on their sources of water, the components of each systems, the types of piping, the design and construction of the systems, facilities, the types of systems, and the types of customer usage that they serve. While there are some similarities between the systems, they record showed that the

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<sup>3</sup> See Tex. Water Code § 13.145(a).

<sup>4</sup> *In re Application of Double Diamond Utilities, Inc. to Change its Water Rates and Tariff in Hill, Palo Pinto, and Johnson Counties, Texas* Proposal for Decision, SOAH Docket 582-08-0698 at 15; see also *id.* at 30-31 ("DDU has failed to meet its burden of proof in this rate making proceeding. . . . The three water systems are different in terms of age, size, type of development served, and sources of water.").

<sup>5</sup> *Id.* at p. 18.

<sup>6</sup> *Id.* at pp. 19-20.

<sup>7</sup> *Id.* at p. 20.

systems are not substantially similar. The facilities in Texas Landing are very old, and in need of replacement.<sup>8</sup> The facilities in Goode City are newer, and do not require the same costs that Texas Landing does.<sup>9</sup> Further, the system in Goode City serves only 14 connections, while the Texas Landing system serves 138 connections. The result being, the rates paid by those in Polk County will subsidize a dissimilar utility system that lacks a substantial rate base.

B. Finding of Fact 24

The quality of water between the systems is not similar. The system in Texas Landing has a high level of arsenic, and requires blending of water from several wells to meet government guidelines.

C. Finding of Fact 25

This finding of fact states that TLU's water systems' costs of service are substantially similar within its regional tariff. TLPOA asserts that this is incorrect. While TLPOA initially compared the Texas Landing Subdivision in Polk County to Mangum Estates in Polk County to Goode City, the ALJ found this unhelpful. However, comparing the two systems in Polk County to the Goode City system, there is a three-to-one ratio in cost of service.<sup>10</sup> Utilizing TLPOA Exhibit 6, if Texas Landing and Mangum Estates are combined, then the cost of service amounts to \$9.92 for the Polk County System versus a cost of service of \$32.02 for the Goode City system. Even relying on the Exhibits produced by the Executive Director, using \$5,773.00 in depreciation and twelve percent (12%) return on investment, the cost of service for the Polk County systems is \$11.47, and \$32.69 for Goode City.<sup>11</sup> In *Double Diamond Utility*, the ALJ denied the application when the cost of service varied between the two systems by a factor of

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<sup>8</sup> Reporter's Record 48:21 – 50:24 ("R.R.").

<sup>9</sup> *Id.* at 74:7-10.

<sup>10</sup> TLPOA Ex. 6.

<sup>11</sup> *See* ED-KA-1 referencing Depreciation Assets.

approximately 2.5.

The ALJ's contention that Mr. Venoitte did not provide calculations for the estimated operating expenses for each system, overhead and operating capital is incorrect. Mr. Venoitte presented these calculations in TLPOA Ex. 17. TLU failed to controvert TLPOA's cost per month per connection. They did not question its validity, and the ALJ has failed to address it. This Exhibit shows that the cost per month per connection vary significantly between Goode City and the Polk County Systems

D. Finding of Fact 43

TLU is not entitled to an additional percentage point based on Step G of the Rate of Return Worksheet. As shown in the Record, TLU does not maintain up-to date books and records, does not have effective communications and good customer relations, and is not fiscally responsible with respect to rate filings, including completeness, accuracy, and frequency. The ALJ reasons that Ms. Perryman found the general ledgers and invoice documentation to be well-maintained and up-to date. However, this was only after TLU spent approximately \$55,000.00 on its expert—who admittedly had to correct and/or create the books in preparation for the rate application.

Further, had TLU acted in a fiscally responsible manner with respect to its rate filings it would not be applying for a rate increase that results in an overall annual rate increase of 94.3%. The ALJ's PFD acknowledges that TLU has not had a system-wide rate increase since 1997. This should preclude TLU from receiving an additional point on its rate of return.

E. Finding of Facts 45-47

TLU is only entitled to a rate of return of 8.48%. Findings of Fact 46-47 should change based on this rate of return.

F. Finding of Facts 54-57

The ALJ failed to find that the rate case expenses were in the public interest. “A utility may recover rate case expenses, including attorney fees, incurred as a result of a rate change application only if the expenses are reasonable, necessary, **and in the public interest.**”<sup>12</sup> Rate case expenses amounting to close to \$200,000.00 in order to facilitate a developer who seeks to further his personal business interests are not in the public interest. Nor should fees incurred in order to correct a defective application (both in substance and form) be simply passed on to the ratepayers.

The ALJ states that without specific numbers the ALJ has to approve the amounts as presented. TLPOA respectfully suggests that it is not TLPOA’s burden to prove specific amounts that are unreasonable. It was TLU’s burden to show that its rate case expenses were reasonable, necessary, and in the public interest. TLPOA was forced to bring a Motion to Compel just to obtain the invoices TLU received from its attorneys. This was unreasonable. With the last-minute evidence it received, TLPOA presented evidence of TLU’s spare-no-expense approach to litigating this case. As the finder of fact, the ALJ may substitute its own determination of a reasonable amount.<sup>13</sup>

Further, the underlying accounting and bookkeeping for the utility was so woefully deficient that TLU’s expert witness had to re-work the books and application to attempt to bring them into compliance with the law.<sup>14</sup> The unreasonableness of TLU’s expert, Mr. Morgan, is exhibited by his testimony that what he charges is “per se” the reasonable amount of rate case

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<sup>12</sup> 30 Tex. Admin. Code 291.28(7) (emphasis added).

<sup>13</sup> See *Bair Chase Prop. Co., L.L.C. v. S & K Dev. Co., Inc.*, 260 S.W.3d 133, 137-38 (Tex. App.—Austin 2008, pct. denied) (stating that the determination of reasonable attorney’s fees is a question for the trier of fact).

<sup>14</sup> R.R. at 142:21 – 143:8.

expenses to be passed through to the rate payers.<sup>15</sup>

Additionally, permitting a utility to incur rate case expenses with a complete disregard for the relation to the revenue it will actually gain by approval of its application sets a dangerous precedent. The law and TCEQ rules place the burden on TLU to prove the rate case expenses were reasonable and in the public interest. TLU has failed to meet that burden. TLU should not be permitted to continue to incur fees at the expense of its ratepayers.

G. Conclusion of Law 2

The ALJ concluded that it was proper for David L. Sheffield or Texas Landing Utilities, L.L.C. to file the application for Texas Landing Utilities. This is incorrect. The limited liability company sought the increase in water rates. However, it does not own the utility. The applicant has indisputably shown that it is not the owner of the utility. Mr. Sheffield testified that the transfer of the utility to the limited liability company which filed the application never occurred.

The TCEQ rules regarding Administrative Completeness are not a final determination as to the propriety of the application, or a final determination of the applicant's standing to request a rate change.<sup>16</sup> It is a prerequisite to the applicant being able to charge its new proposed rates.<sup>17</sup> Ideally, the Commission would have determined that this application had material deficiencies. It did not. Just as in a protestant's ability to contest the inaccuracies contained in the rate design, the protestant can contest that this applicant lacks the standing to request an increased rate. As a result, the contested application in this instance is fatally flawed.

Further, the Commission's rules state that "[i]n order to change rates, which are subject to the commission's original jurisdiction, **the applicant utility** shall file with the commission an

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<sup>15</sup> R.R. 222:19 – 225:6.

<sup>16</sup> 30 Tex. Admin. Code § 291.8.

<sup>17</sup> *Id.* at §291.8(b).

original completed application for rate change . . . .”<sup>18</sup> Here, the applicant utility never filed an original completed application for rate change. Rather, an entity that does not operate as a utility, holds no utility assets, and that does not maintain a bank account applied to increase rates. This prevents a finding that it was proper for either Mr. Sheffield or the limited liability company to file the application. Only Mr. Sheffield had that ability. He failed to do so.

H. Conclusion of Law 6

The facilities, quality of service, and cost of service in the Polk County systems and the Goode City system are not substantially similar within the meaning of Tex. Water Code § 13.145.

I. Conclusion of Law 8

This conclusion of law is redundant of Conclusions of Law 6 and 7. Further, whether TLU meets the criteria set forth in Tex. Water Code §13.145 is not a matter of compliance, but rather a standard it must meet by the characteristics of its systems. TLU failed to show that its systems are substantially similar.

J. Conclusion of Law 9-10

As stated throughout, TLU should not be entitled to receive a consolidated water or sewer rate schedule. TLU has failed to show its systems are substantially similar.

K. Conclusions of Law 16-18

There is nothing reasonable and necessary about rate case expenses that amass \$142,314.81 for an additional \$70,000.00 in revenue requirement. TLU failed to meet its burden that these expenses were reasonable, necessary, and in the public interest. The pre-PFD expenses sought by TLU amount to approximately \$621.00 per connection. For those with both water and sewer connections, that amounts to over \$1,300.00 that they will have to pay in

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<sup>18</sup> 30 Tex. Admin. Code § 291.22(a) (emphasis added).

addition to their normal bill.

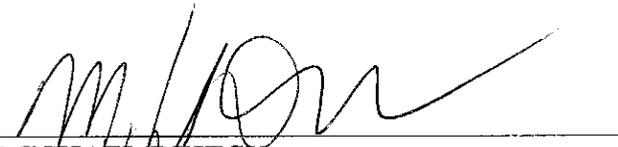
Additionally, the ALJ failed to rule that those rate case expenses proposed by TLU are in the public interest. They are not.

III. CONCLUSION

Therefore, TLPOA respectfully requests that the Commission sustain the Protestant's exceptions, and adopt an order denying TLU's Application for a Water Rate/Tariff Change.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was telecopied the 14<sup>th</sup> day of December, 2009, to the parties on the attached service list.

  
MICHAEL DEITCH

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