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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2011 JUN -6 PM 2:54
CHIEF CLERKS OFFICE

March 8, 2011

Docket Clerk
Office of the Chief Clerk
TCEQ
P.O. Box 13087
Austin, TX 78711

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

Dear Clerk:

Enclosed for filing in the above-referenced matter please find the original of Protestant
Bill F. Bryan's Exceptions to Proposal for Decision with concurrence of David Veniotte and John
Stacy. A copy will also be filed electronically with your office. By copy of this letter, the same is
being sent to opposing counsel and all interested parties.

Sincerely,



Bill F. Bryan

Enclosures

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

APPLICATION FOR A WATER §
RATE/TARIFF CHANGE OF TEXAS §
LANDING UTILITIES, CERTIFICATE §
OF CONVENIENCE AND NECESSITY §
NO. 11997 IN POLK COUNTY, §
APPLICATION NO. 35838-R AND §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY NO. 20569 IN POLK §
COUNTY, APPLICATION NO. 35840-R §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

7/21 JUN -6 PM 2:54
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**PROTESTANT BILL F. BRYAN'S EXCEPTIONS TO THE PROPOSED ORDER
WITH CONCURRENCE OF DAVID C. VEINOTTE AND JOHN STACEY**

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

1. The Commissioners of the Texas Commission on Environmental Quality (TCEQ) finally received this case for decision on February 10, 2010, almost 2 ½ years after it was filed. The Commissioners decided all but two issues and remanded these for further consideration. A hearing was held on the merits of these two issues on January 12, 2011.
2. The two issues remanded by the Commissioners are the extraordinarily high rate case expenses of \$248,175.60 submitted by the Applicant and how to properly address line loss issues.
3. The Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) on May 9, 2011 essentially adopting the Terrill's Law firm position on Attorney and rate case fees and addressing several other issues.

4. The Protestant regrets what he is going to have to write in these Exceptions. The Protestant, in over 35 years of handling thousands of Regulatory Hearings before Federal and State Agencies for a major corporation, has never had to address such incompetence or bias as demonstrated by this ALJ. The Proposal for Decision issued by this Administrative Law Judge is without a doubt either the most incompetent Proposed Decision ever seen by the Protestant or the Administrative Law Judge is so biased toward making sure that rate case and attorney fees are not reduced to law firms in Austin that he should recuse himself from further consideration of this case. The Protestant will address many of the factual flaws in the PFD, the flawed circular reasoning used by the ALJ to reach his decision, and the total misapplication of law by the ALJ. These exceptions are difficult to write. The PFD is so poorly written and the legal reasoning so circular and unclear, that addressing the flaws in a brief straight forward manner is difficult.
5. The Commissioners of the TCEQ have already rejected a similar finding about recovery of Attorney Fees at the Commissioner's Conference in February of 2010 and sent this case back to determine the proper amount of rate case expenses. Had the ALJ reviewed the tapes of the Conference, he would have been able to determine that the Commission was not going to allow recovery of 100% of the attorney and consultant fees. The Commissioners were very obviously displeased at the Conference when presented with \$142,314.81 of rate expenses and even more displeased when the applicant updated the amount by over another \$100,000. At that conference there was discussion of what expenses were proper and what expenses should not be allowed. For instance, the Executive Director outlined that time spent for training of young attorneys or time spent by attorneys or consultants in correcting the books of related entities cannot be charged to the customers as rate case expenses. Charges for both of these are contained in the rate case expenses as admitted by

the witnesses for the utility, but the witnesses never identified how much time or expense for these items are in the rate case expenses. Thus the whole testimony as presented by TLU is suspect and cannot be relied on to support any finding of reasonableness. Even though this was pointed out clearly at the rehearing and in the closing briefs, this was totally ignored by the ALJ.

6. The Protestant has read the PFD over and over attempting to follow the tortured legal reasoning of the ALJ without success. The ALJ states that the TCEQ has the authority to determine whether professional fees may be recovered and wide discretion is given to the agency in making this decision. The ALJ cites the standards set by the bar and quotes the eight (8) standards. The ALJ also cites the Water Code, Section 291.8 (7): "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." Then the ALJ completely ignores these standards and past rulings by the Commission in analyzing this case.
7. The Protestant is at a loss to explain how the ALJ arrived at a legal conclusion as to how the Applicant "proved" that the rate case expenses were reasonable and necessary. The ALJ never states how he finds that TLU has met its burden to prove that the rate case expenses are reasonable and necessary. It seems that the standard that the ALJ is using is if the Applicant puts on a witness that is an attorney, the witness submits invoices that were billed to the utility and then makes a statement that in his opinion the fees are reasonable and necessary, this is sufficient evidence to meet the burden of proof. In fact, the paid invoices of the attorneys and a consultant was all that was put into evidence along with unsubstantiated statements that the invoices were reasonable and necessary by the witnesses for TLU. The ALJ addressed this exact evidence on page 5. Then the ALJ on page

16 states how the burden of proof then shifts to the ED, OPIC, and the protesting parties to identify the parts of TLU's fees that were unreasonable or unnecessary. The ALJ cites no authority for this "shifting burden" theory and the Protestant is not aware of any authority for this position. This shifting burden does exist in some portions of Tort Law, which the ALJ must be confusing with Administrative Law.

8. The burden of proof is entirely on the applicant to demonstrate that the requested rate case expenses are reasonable, necessary and in the public interest. There is no balancing and shifting burden. The ALJ has cited several cases in the PFD where the standard employed was that the burden was entirely on the applicant, but unfortunately ignored them in his analysis. The Applicant has the entire burden to prove that the requested amounts are reasonable and necessary. As to the part of the rate case expenses that are attorney fees, the standards set by the Bar Association should be utilized. And in this effort, TLU has totally failed. All that the applicant has demonstrated, with the evidence that they put forward, was that the attorneys and consultants billed the amounts to the utility. This is not sufficient to demonstrate that the fees are reasonable and necessary. Nor does it meet the standard as provided in the Bar Rules that: " (3) the fee customarily charged in the locality for similar services." Nor have they identified the amounts that were charged for training or for correcting the books of related entities such as a land development company owned by David Sheffield. Thus the entire testimony presented by TLU fails to prove that the amounts requested for recovery by TLU is reasonable and necessary.
9. The ED evidence directly addressed this critical issue of what fees are customarily charged in his testimony. An analysis was performed showing what rate case expenses were approved by the TCEQ in protested cases for similar utilities to TLU asking for similar rate increases as TLU. Unfortunately the ALJ, for some unfathomable legal reasoning totally rejected this

analysis and instead found that unsubstantiated statements made by the witnesses for TLU that the rate case expenses were reasonable and necessary was more reliable.

10. The ALJ addressed the issue of "Public Interest" as it relates to recovery of rate case expenses on page 8 and on page 23. The ALJ cited two cases where the agency used the concept of public interest to deny the recovery of legal fees. The ALJ then gives a discussion of what is meant by in the public interest. This discussion is circular and totally flawed. The ALJ rambles on about rule making and the lack of a request by the Commissioners to adopt new rules. The ALJ finally states that since he concluded that the expenses are reasonable and necessary, the Commission should adopt them as being in the public interest. This conclusion is simply more legal nonsense. Public Interest relates to the fact that the rate case expenses and the "rates" that the Commission sets based on the those expenses must be just and reasonable to the consumers. If the Commission would allow legal firms to conduct themselves as the Terrill firm has in this case, and run up the legal fees to astronomical levels, the rights of parties to seek redress before agencies will be effectively denied. No party could ever protest knowing that if they did so, their rates would double to pay an Austin Law firm. The ALJ in the case takes the legal position that "... because the expenses are reasonable and necessary, the Commission should adopt them as being in the public interest." This is more circular legal nonsense that completely voids the concept of public interest and should be totally rejected by the Commission

11. The ALJ totally rejected the evidence put forth by the ED and criticized the witness put on by the ED. The Protestant is not going to waste any more time going through the very poor legal analysis that is put forth by the ALJ, but simply states that this is simply more of the same obviously biased findings that the ALJ felt that had to be made if he was to approve the rate case expenses as requested by the Applicant. The evidence put forth by the ED was

very competent and certainly was more persuasive as to what was reasonable, necessary, in the public interest and allowed by the Commission in past protested cases similar to the case filed by TLU.

12. The PFD as submitted by the ALJ is full of factual errors and the footnote cites are in many places incorrect as to the conclusion drawn by the ALJ. The Protestant is not going to waste his time pointing out the numerous errors in the PFD, as the entire PFD concerning rate case expenses should be rejected by the Commissioners.
13. TLU has been collecting the increased fees requested in its original application since December of 2007. The Commissioners ordered the utility to refund to the customers the amounts collected above what was approved. Now for some reason on page 29 of the PFD, the ALJ cuts off the refund the utility owes the customers as of January of 2010. The rates being collected by the utility above what has been approved are still in effect and are being collected today and will continue to be collected until a final order is entered by the Commission. By what authority or what reasoning the ALJ proposes that the utility can keep money collected above that approved by the Commission from January of 2010 forward is not addressed in the PFD. Under the ALJ's astute legal finding, refunds must be made for excess fees collected from December of 2007 to January of 2010, a period of twenty six (26) months. TLU gets to keep excess fees from February of 2010 forward, which is already a period of 14 months and is continuing. This is just another example of the obvious bias toward the utility and the law firm demonstrated by this ALJ. This provision should be totally rejected by the Commission and refunds ordered from the time the rates went into effect in December of 2007 until a final order is entered by this Commission.
14. The Protestant is not going to spend any more time or effort on addressing the totally incompetent legal reasoning and obviously biased opinions of this ALJ. The Commission

should totally reject the PFD written by this ALJ as it concerns rate case expenses. Adoption of the PFD by the TCEQ would effectively remove from the Commission any authority to determine the reasonableness of rate case expense. All that would be required by the utility would be to put on an attorney, have him state the amount billed to the utility and that in his opinion the charges are reasonable and in the public interest and then the protestants or the ED would have to prove the amounts are unreasonable. Of course, the ability of the Protestants or the ED to prove this would be impossible using the flawed legal reasoning of this biased ALJ.

15. The ALJ does finally acknowledge that the rate case expenses are very large on the bottom of page 27 when discussing the time frame for collection of surcharges. The ALJ seems not to recognize that regardless of what time period the surcharge is collected, the amount charged to each customer for rate case expenses is outrageous. Each amount shown in the table on page 27 must be **doubled** since it will be collected for a water connection and a sewer connection for the customers in Texas Landing. And the total surcharge to be collected for each customer will exceed \$1850 per customer regardless what time frame the surcharge is paid. For some reason, this ALJ seems to feel that if the surcharge is paid over 5 years rather than a shorter period, it would somehow make the rate case expenses more reasonable.

16. The Protestants put on a witness, David Veinotte, at the initial hearing to describe in detail why this utility should not be allowed to recover any rate case expense. We asked that and were assured that this testimony would be made a part of the record on remand by the ALJ Smith. Unfortunately, the new ALJ has obviously totally missed this point as he states in footnote 69 on page 16 of the PFD no other party presented testimony on rate case expenses. The Protestants' position has not changed since the original hearing and the

reason for not putting a witness on at the remand hearing was that the testimony would be exactly the same and there was no reason to burden the record with more testimony. Again, it is the Protestants position that the utility should not be allowed to recover rate case expenses. TLU filed a very flawed application, refused to work or meet with its customers necessitating a protest to resolve the issues and has violated past Commission order and over-collected tens of thousands of dollars from its customers.

17. If the Commission rejects the Protestants position as to no rate case expense recovery, it has only two other options available to it. It can approve the \$52,000.00 recommended by the ED or the higher \$60,000.00 amount. The ED's analysis was that \$52,000 was the average of what several utilities similar to TLU had collected in similar protested cases in the past. Then the ED added \$8000.00 to the amount to bring the total to \$60,000.00 based on the reasoning that the Protestant raised issues not normally a part of typical rate case. As pointed out in the Protestants closing arguments, the extra \$8,000 the ED recommends adding to the rate case expenses to be recovered is based on flawed reasoning. The Protestants raised notice issues, which are a part of each and every case that comes before every agency. Notice is jurisdictional and without proper notice, the agency is without jurisdiction to even hear the cause. The second issue raised by the Protestants was that it was discovered during the proceedings that TLU had violated Commission orders both times that it had requested surcharges in the past and over collected tens of thousands of dollars illegally from its customers. These facts were withheld from the Protestants, even after repeated discovery requests and discovery was forthcoming just before the initial hearing was scheduled. The Protestants were then forced into filing testimony about this issue of overcharges shortly before the hearing. The ED added the extra \$8000 to rate case expenses as a penalty on the Protestants because they raised the overcharge issue at the

hearing instead of going through the complaint route. The reasoning that this is not a normal issue at a rate hearing is simply not valid. The Protestants certainly hope that it is not a normal issue and that a typical utility is not routinely violating Commission orders and over-collecting rates from its customers and hiding that fact from its customers. If the Protestants had not raised this issue at the hearing, the books of TLU would have been incorrect and improper rates would have been approved. As it is, the books were corrected and a proper rate analysis was possible. To penalize the Protestants for raising this issue is simply not right. The actions of the Utility were what caused this problem. The \$8,000 amount should not be added to the rate case expenses, instead it should be deducted from the amount as an example that this type of conduct will not be tolerated by the Commission from utilities and to compensate the expense the Protestants had to pay to discover this issue. This would result in rate case expenses of \$44,000 (\$52,000-\$8,000).

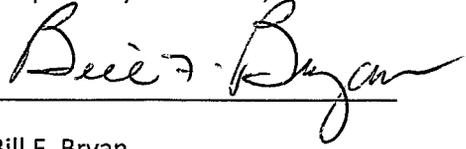
Conclusion and Relief Requested

18. The PFD submitted by this ALJ should be totally rejected by the TCEQ Commissioners as it pertains to rate case expenses and date of cut off of refunds. The ALJ is obviously biased and has written a very flawed legal analysis attempting to justify recovery of the entire amount of rate case expenses by TLU. Adoption of this PFD would remove all authority from the TCEQ to determine reasonableness of rate case expenses in the future.
19. The Commission should request from the Attorney General's Office an explanation as to why an ALJ that is supposedly an unbiased trier of fact would write such a flawed and biased opinion, twisting the law to arrive at the opinion he reached.
20. The Commission should decide this matter based on the record and please do not remand this for further consideration. This case has been ongoing since September of 2007, and it

will be close to 4 years before an order will be issued in this case. There is nothing left to say in this matter that has not been said several times. If the Commission does remand, a new ALJ should be demanded from SOAH. It is clear that this ALJ is simply not capable of rendering a fair and unbiased opinion.

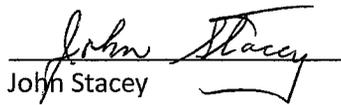
21. Texas Landing Utilities has failed to meet its burden of proof for recovery of rate case expenses. It has failed to prove that the expenses are reasonable and necessary and in an amount customarily charged in the locality for similar legal service. The recovery of rate case expenses should be denied. Alternatively, the rate case expenses granted should be no more than those recommended by the Executive Director of \$52,000. TLU should be required to give to each customer an accounting of overcharges since December 2007 and a semi-annual accounting should be required to the TCEQ showing the amounts of the surcharges collected. The difference between the rate case expenses requested by TLU and the amount finally granted should be ordered not to be allowed to be recovered in subsequent rate cases. The method of handling line loss should be adopted as recommended by the Executive Director. Full refunds of fees collected by TLU from December of 2007 forward until the new rate schedule goes into effect should be ordered by the Commission and not discontinued as of January 2010. As has been demonstrated by the actions of TLU twice in the past when allowed to collect surcharges, the customers need protection from TLU, and the Commission is the only party that can provide that protection.

Respectfully submitted,

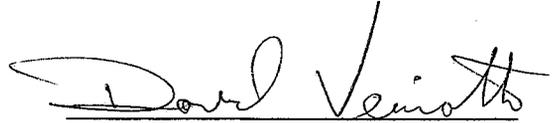


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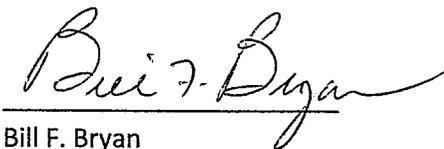


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Certificate of Service

I hereby certify that on June 4, 2011, a true and complete copy of the foregoing was sent to the following by facsimile, first-class mail, or e-filing:

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State Office of Administrative Hearings	Judge Paul Keeper 300 West 15 th Street Austin, Texas 78701	Via mail
State Office of Administrative Hearing	SOAH – Docket Clerk 300 West 15 th Street Austin, Texas 78701	Via mail
TCEQ	Docket Clerk Office of the Chief Clerk P.O. Box 13087 Austin, Texas 78711	Via mail & e-filing
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Bill F. Bryan

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.”¹ However, it is TLU’s responsibility and legal burden to show that its proposed rate increase is just and reasonable.² TLU may only consolidate more than one system if its systems are

¹ Tex. Water Code § 13.183(a).

² *Id.* at § 13.184(c).

substantially similar in terms of facilities, quality of service, and cost of service.³ 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"⁴ 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.⁵ 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.⁶ "This would not result in water rates that are just and reasonable for the [older system] ratepayers."⁷ 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

³ See Tex. Water Code § 13.145(a).

⁴ *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.").

⁵ *Id.* at p. 18.

⁶ *Id.* at pp. 19-20.

⁷ *Id.* at p. 20.

systems are not substantially similar. The facilities in Texas Landing are very old, and in need of replacement.⁸ The facilities in Goode City are newer, and do not require the same costs that Texas Landing does.⁹ 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.¹⁰ 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.¹¹ In *Double Diamond Utility*, the ALJ denied the application when the cost of service varied between the two systems by a factor of

⁸ Reporter's Record 48:21 – 50:24 (“R.R.”).

⁹ *Id.* at 74:7-10.

¹⁰ TLPOA Ex. 6.

¹¹ 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.**”¹² 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.¹³

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.¹⁴ 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

¹² 30 Tex. Admin. Code 291.28(7) (emphasis added).

¹³ 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).

¹⁴ R.R. at 142:21 – 143:8.

expenses to be passed through to the rate payers.¹⁵

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.¹⁶ It is a prerequisite to the applicant being able to charge its new proposed rates.¹⁷ 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

¹⁵ R.R. 222:19 – 225:6.

¹⁶ 30 Tex. Admin. Code § 291.8.

¹⁷ *Id.* at §291.8(b).

original completed application for rate change”¹⁸ 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

¹⁸ 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 14th day of December, 2009, to the parties on the attached service list.


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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 REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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

This reply responds to statements made by the Executive Director (“ED”) and Texas Landing Utilities in their exceptions to the PFD. The record from the contested case hearing, TLPOA’s closing arguments, and TLPOA’s Exceptions to the ALJ’s PFD set forth the primary contested issues—an applicant that does not own the utility seeks a rate change; the lack of substantial similarity between the different systems; the rate of return; and the excessive and unreasonable rate case expenses sought by Texas Landing Utilities—and TLPOA’s position with respect to those issues.

TLPOA supports and agrees with the Exceptions from the Office of Public Interest Counsel. TLPOA maintains its original position that Texas Landing Utilities did not meet its burden of proof entitling it to consolidation of the Goode City and Polk County systems. Had the Executive Director’s staff examined the data provided by Texas Landing Utilities (“TLU”) as closely as they did in the application of *Double Diamond Utilities*, cost of service analyses

between the systems would have shown that they are not substantially similar and TLU would not be entitled to consolidation of its two systems. Further, TLPOA believes the ALJ's reliance on the fact that both facilities comprised of PVC pipes, pressure tanks, piping, and the use of chlorination does not prove that the facilities are substantially similar, but that they share the commonalities that all water utility systems share. TLPOA presented evidence that the cost of service between the Polk County systems and the Goode City system vary greatly. TLU's application should be denied.

As stated in its exceptions, TLPOA disagrees with Finding of Fact 46. The proper rate of return, utilizing the principles set forth in 30 Tex. Admin. Code § 291.31(c)(1)(A)-(C), is 8.48%. The calculations reflected in Findings of Fact 46 and 47 should reflect a rate of return of 8.48%.

TLPOA disagrees with each and every exception set forth by TLU. These matters are addressed in TLPOA's Closing Arguments and its Exceptions. TLPOA's primary disagreement is with TLU's continued disregard of the corporate form; its objections to the use of the Rate of Return worksheet, despite its incorporation of the principals set forth in 30 Tex. Admin. Code § 291.31(c)(1)(A)-(C); and TLU's repeated insistence that it can consolidate its tariffs without regard for Tex. Water Code § 13.145. Tex. Water §13.145's "goal" is not to promote regionalization. Its purpose is to set forth a standard that a utility must meet in order to consolidate its system. It prevents, as is the case in this instance, a developer from using one utility system to subsidize the costs of his new development and its system. Whether or not to allow a utility to regionalize its tariffs is considered under Tex. Water Code §13.182(d) and 30 Tex. Admin. Code § 291.21(n). This is a case of consolidation, not regionalization. Section 13.145 of the Texas Water Code requires TLU to show that its systems are substantially similar in terms of facilities, quality of service, and costs of service. While the TCEQ staff may favor

consolidation under any circumstance, the legislature has chosen to place a burden on TLU to show the systems sought to be consolidated are substantially similar in terms of costs of service, quality of service, and facilities. TLU has failed to meet that burden.

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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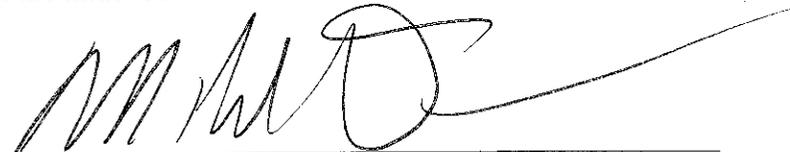
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