Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS
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ON ENVIRONMENTAL
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CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 20, 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 Buena Vista Water System to change its water rates and tariff under CCN No. 11656 in Burnet County. SOAH Docket No. 582-08-2245; TCEQ Docket No. 2007-1878-UCR.

Dear Ms. Castañuela:

Enclosed for filing with the Texas Commission on Environmental Quality (Commission) is the original plus seven copies of "The Executive Director's Response to Buena Vista Water System's Exceptions to the Proposal for Decision."

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

Sincerely,

Ron M. Olson
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

printed on recycled paper using soy-based ink

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January 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.

Ron Olson, Staff Attorney
Environmental Law Division

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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CHIEF CLERKS OFFICE

MAILING LIST
Application of Buena Vista Water System to change its water rates/tariff
under CCN No. 11656 in Burnet County

SOAH Docket No. 582-08-2245
TCEQ Docket No. 2007-1878-UCR

FOR SOAH:
Honorable William Newchurch
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-0325
Fax: 475-4994

FOR THE APPLICANT:
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349 CR 139
Burnet, Texas 78611

FOR THE PROTESTANTS:
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Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

SOAH DOCKET NO. 582-08-2245
TCEQ DOCKET NO. 2007-1878-UCR

2009 JAN 20 PM 2:02
CHIEF CLERKS OFFICE

APPLICATION OF BUENA VISTA WATER SYSTEM TO CHANGE ITS WATER RATES AND TARIFF, CERTIFICATE OF CONVENIENCE AND NECESSARY NO. 11656, IN BURNET COUNTY.	§ § § § § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE EXECUTIVE DIRECTOR'S RESPONSE TO BUENA VISTA WATER SYSTEM'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

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 following response to Buena Vista Water System's (Buena Vista or Applicant) Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) in the above captioned matter.

I. New evidence cannot be introduced into the record through exceptions to the PFD.

Under section 13.184(c) of the Texas Water Code, the Applicant has the burden to prove that its requested rates are just and reasonable.[1] The opportunity for the Applicant to satisfy this burden is during the hearing on the merits. However, during the hearing on the merits, Buena Vista submitted no evidence to meet its burden of proof, other than an unsubstantiated balance sheet alleging that the utility is operating at a loss. The ED submitted discovery requests to the Applicant requesting all documentation that supports Buena Vista's application. The ED received only a few invoices for various capital items, accounting ledgers mixed with personal and business expenses, and credit card statements. ED Staff reviewed what was received and made its recommendation to deny the rate application.

Buena Vista now seeks to introduce new evidence into the record disguised as exceptions to the ALJ's PFD. Buena Vista has attached many pages of documents to its exceptions to the PFD. None of these documents were introduced into evidence by the Applicant and many of the

documents were not disclosed to the ED in the discovery process. The introduction of this new evidence cannot be allowed. The fact finding process is accomplished during the hearing on the merits and not through exceptions to the PFD. The Commission's finding of facts may be based only on the evidence that is in the record.[2] The new documents that Buena Vista attached to its exceptions are not in evidence. Moreover, there was no opportunity for the ED to cross-examine Buena Vista regarding these new documents.[3] Therefore, the ED recommends that the Commission adopt the ALJ's Proposal for Decision, with the ED's exceptions, and disregard all documents that are outside of the record.

II. The ALJ has recommended appropriate adjustments based on the evidence.

The Executive Director reviewed the rate application and the limited documentation that Buena Vista provided in discovery. Based on that information, the Executive Director made adjustments and recommendations in its pre-filed testimony. The ALJ determined that the evidence adduced showed that it would not have been just and reasonable to grant Buena Vista's requested rate as it was submitted in the application, and ultimately adopted most of the recommendations made by the ED.

A. The ALJ correctly disallowed expenses for meters.

Buena Vista argued that the ED had the burden of proving that certain meters should not be included in Buena Vista's invested capital. However, as stated in the ALJ's PFD, the burden of supporting the application lies not with the ED, but with the Applicant. Buena Vista claimed a net book value for meters of $1,252. However, the ED testified, and no evidence was provided to the contrary, that the customers have already paid for those meters through their tap fees and should not pay for them again through rates. The ALJ agreed and appropriately disallowed the $1,252 from invested capital.[4]

Buena Vista further argued that there were additional meters that should have been added to

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1 TEX. WATER CODE § 13.184(c): "In any proceeding involving any proposed change of rates, the burden of proof shall be on the utility to show that the proposed change…is just and reasonable."

2 TEX. GOV'T CODE § 2001.141(c): "Findings of fact may be based only on the evidence and on matters that are officially noticed."

3 TEX. GOV'T CODE § 2001.087: "In a contested case, a party may conduct cross-examination required for a full and true disclosure of facts."

4 PFD, Section VII, Subsection D1, p. 17

invested capital. However, Buena Vista did not submit any invoices during the hearing on the merits to support its position. In its exception to the PFD, Buena Vista now seeks to introduce previously undisclosed invoices for meters. However, not only has the time ended for submitting new evidence, Buena Vista still did not provide any evidence that documents whether these additional meters were replacement meters (meters paid for by the utility) or original meters paid for through customer tap fees. Buena Vista simply attached invoices to its exceptions without explaining which meters were replacement meters and providing documentation as to the address where each meter was installed. Due to the absence of evidence in the record, the meter expenses Buena Vista claims in its exceptions to the PFD must be disallowed.

B. The ALJ correctly disallowed the property taxes for personal lots.

Buena Vista claims in its exceptions to the PFD that the personal lots referred to as office expenses are not personal lots, but rather lots used by the utility. The Executive Director disallowed this expense because there was no evidence presented that these properties were used by the utility. During the hearing on the merits, Buena Vista did not provide any evidence to establish that these lots were used for anything other than personal lots. The ALJ correctly disallowed the property taxes for these two lots because the Applicant did not prove that this expense had a reasonable connection to the provision of water service during the test year.[5]

C. The ALJ correctly disallowed $330 for repair and maintenance expenses.

In its exceptions to the PFD, Buena Vista claims that $330 should be included as an expense for repairs and maintenance. Buena Vista claims that this amount was paid to Kevin Maze, Steve Lance, and Bob Young for work they have done for the utility. However, Buena Vista did not provide any invoices documenting that the work done was for the utility. In fact, the copies of the checks that Ms. Bryant used to pay for the work show that they are personal checks in the name of Ms. Bryant and her daughter. Even though Buena Vista has checks in its name, Ms. Bryant did not use those checks and instead used her personal checks. Therefore, the Executive Director disallowed the $330 as an expense for the utility because not only were there no invoices documenting this work, but the method of payment was from Ms. Bryant's personal account. The ALJ agreed with the

5 PFD, Section VII, Subsection E2, p. 23-24

ED and correctly disallowed the $330 from being included in Buena Vista's expenses.[6]

III. CONCLUSION

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. An applicant must sustain its burden of proof in supporting its application. As the PFD states, Buena Vista clearly failed to meet its burden in proving that its proposed rates are just and reasonable. The ED supports the ALJ's adjustments and recommends that the Commission adopt the ALJ's PFD as revised by the Executive Director's previously filed exceptions.

Respectfully submitted,

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By Ron
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REPRESENTING THE
EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSIOIN
ON ENVIRONMENTAL QUALITY

6 PFD, Section VII, Subsection E3, p. 24