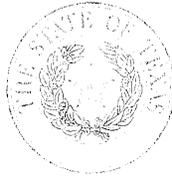


Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 10, 2009

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 APR 10 AM 10:33
CHIEF CLERKS OFFICE

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

RE: Executive Director's Replies to Exceptions to the Proposal for Decision regarding Rate/Tariff Change Application of HHJ, Inc. dba Decker Utilities; SOAH Docket No.582-08-1719; TCEQ Docket No. 2008-0164-UCR.

Dear Ms. Castañuela:

Enclosed for filing with the Texas Commission on Environmental Quality are the original and seven copies of the Executive Director's Replies to Exceptions to the Proposal for Decision for the above-referenced matter.

If you have any questions, please contact me at 239-6033.

Sincerely,

A handwritten signature in cursive script that reads "Erin Selvera".

Erin Selvera
Staff Attorney
Environmental Law Division

Enclosure

cc. Sheresia Perryman, TCEQ, Water Supply Division, MC 153
Heidi Graham, TCEQ, Water Supply Division, MC 153

SOAH DOCKET NO. 582-08-1719
TCEQ DOCKET NO. 2008-0164-UCR

2009 APR 10 AM 10:33

APPLICATION OF HHJ, INC.
DBA DECKER UTILITIES,
TO CHANGE ITS WATER
AND SEWER RATES

§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**THE EXECUTIVE DIRECTOR'S REPLIES TO APPLICANT'S EXCEPTIONS TO THE
ALJ'S 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 Replies to Applicant's Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) in the above captioned matter.

**I. APPLICANT'S ARGUMENT REGARDING RECOVERY OF EXPENSES FOR
MOTIONS FOR REHEARING IS NOT PERSUASIVE.**

Applicant states in its exceptions to the PFD that disallowance of rate case expenses for motions for rehearing is arbitrary and capricious.¹ The ED respectfully disagrees and would assert that the contrary is true. Allowing rate case expenses for Motions for Rehearing is unreasonable, unnecessary, and not in the public interest.² As support for its contention, the Applicant submits a recap of its counsel's oral testimony regarding rate case expenses stating that it was "based upon 30 years of experience in trying utility rate cases."³ Applicant goes further to state that "HHJ is unaware of any prior TCEQ decision that disallowed rate case expenses on procedures required by law as a pre requisite to having access to the courts."⁴ This is an untrue

¹ Exceptions of HHJ, Inc. DBA Decker Utilities at 5.

² Executive Director's Replies to Closing Arguments, at 11-12.

³ Exceptions of HHJ, Inc. DBA Decker Utilities at 3.

⁴ *Id.*

statement. In fact, Applicant's counsel, Mr. Mark Zeppa was one of the attorneys for Aqua Texas, Inc.'s (Aqua Texas or Aqua) rate change application that went through a contested case proceeding at which the Commission specifically considered, and disallowed rate case expenses for post hearing processes such as motions for rehearing which Aqua Texas filed on October 20, 2008.⁵ The Aqua matter went before the Commission on three occasions, first on March 19, 2008, again on June 18, 2008, and finally on August 20, 2008. At the second Commission meeting, TCEQ Commissioners considered the Administrative Law Judge's Proposal for Decision on the contested rate case. During this meeting, the Commission considered the cut-off or "clock stop" date for rate case expenses to be claimed by the Applicant. The issue was discussed and a determination was made that the rate case expenses would be allowed up to the date of the second Commission meeting.⁶ This would not include any rate case expenses related to the preparation, filing or reply to a motion for rehearing. The decision is generally memorialized in the Commission's final order, issued on September 23, 2008. Within this order, the Commission's finding of fact number 77 states the following:

77. As of June 18, 2008, Aqua Texas incurred reasonable and necessary rate case expenses in this matter in the amount of \$2,751,170.50 for preparation of the Application, including deriving the original plant and equipment costs, developing the proposed rate/tariff changes, filing fees, notice costs, and participation by experts and counsel in the contested case hearing.

⁵ At the June 18, 2008 Commission meeting, TCEQ General Counsel Trobman announces that Mr. Zeppa was present, indicating that he had registered as counsel for Aqua Texas. In addition, Mr. Zeppa is listed as counsel for Aqua Texas on the mailing list for the Commission Order.

⁶ An excerpt of the commission meeting containing the discussion between ALJ Bennett and the Commissioners regarding "when the clock stops" for rate case expenses, is included as attachment A to this document.

Conclusion of Law 25 follows suit stating the following:

24. Rate case expenses in the amount of \$2,751,170.50 through June 18, 2008, were reasonable and necessary expenses within the meaning of TEX. WATER CODE §§ 13.043, 13.084, 13.183(a)(1) & 13.185(d) and (h), and 30 TEX. ADMIN. CODE § 291.31(b).

The ED asserts that the Commission's consideration and decision regarding the disallowance of post hearing rate case expenses as applied to the Aqua Texas matter should be applied to this matter. Furthermore, application of this analysis is necessary to carry out the intent of TCEQ rules regarding the allowance and disallowance of rate case expenses. Specifically, the commission adopted the addition of TCEQ rules 291.28 (7) through (9) based upon concerns over the possibility that utilities have an incentive to overreach in their rate applications if utilities believe that customers will ultimately bear all rate case expenses.⁷ TCEQ rules 291.28(8) and (9) were adopted to establish where rate case expenses will be disallowed as a matter of law.⁸ Rule 291.28(7) was added to make it clear that all rate case expenses will be evaluated to see if they are reasonable, necessary, and in the public interest on a case-by-case basis.⁹ As noted in the PFD and the ED's Replies to Closing Arguments, recovery of rate case expenses for motions or rehearing is not in the public interest.¹⁰ The ED concedes that these expenses are not specifically prohibited by rule or statute. However, if the Commission were to

⁷ 31TEX. REG. 8106, 8107 (September 22, 2006). This rule implements Texas Water Code section 13.185(h)(3) which states that the regulatory authority may not include for ratemaking purposes any expenditure found by the regulatory authority to be unreasonable, unnecessary, or not in the public interest, including executive salaries, advertising expenses, legal expenses, and civil penalties or fines.

⁸ *Id.*

⁹ *Id.*

¹⁰ Executive Director's Replies to Closing Arguments, at 11-12. 30 TEX. ADMIN. CODE § 291.28 (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.

allow for recovery of expenses attributed to a motion for rehearing, this act would require the Commission to issue an order that would be speculative as to the costs associated with the preparation of such a motion.¹¹ There would be no verification of the amount of time associated with the preparation of the motion or any other associated expenses which would force the Commission to overlook the rule requiring the Applicant to show that the costs are reasonable and necessary.¹² The speculative nature of the costs could also call in to question the validity, finality and enforceability of the Commission order. Moreover, allowing for recovery of these costs would open the door for Applicants to abuse the system by collecting money for a cost that may or may not be incurred. As noted above, the purpose of the rules in section 291.28 is to avoid a situation where the applicant has any incentive to overreach in rate applications by precluding rate case expenses that are unreasonable, unnecessary and against the public interest.¹³

As additional support for its argument, Applicant asserts that the ED's argument denies any applicant an opportunity to exercise its full due process hearing rights.¹⁴ This assertion is incorrect. Nothing regarding application of the rules or the Commission's prior decisions denies this applicant, or any applicant from filing a motion for rehearing, responding to one, or seeking judicial review of the matter if the Applicant chooses to do so.¹⁵ The ED's position is that the

¹¹ As discussed in the Commission meeting on the Aqua Texas matter, Commissioner Soward expressed concern about the speculative nature of post hearing rate case expenses stating "I'm not sure I'd be willing to let lawyers project their fees." See attachment A.

¹² Executive Director's Replies to Closing Arguments, at 11-12. PFD at 50. 30 TEX. ADMIN. CODE §291.25(b).

¹³ 31TEX. REG. 8106, 8107 (September 22, 2006).

¹⁴ Exceptions of HHJ, Inc. DBA Decker Utilities at 2.

¹⁵ The Applicant attempts to use Ms. Moquin's prior submission of untimely motions as a basis for asserting that the Protestants may file a motion for rehearing. This assertion is without merit as it provides no prediction as to Ms. Moquin's or any other parties intentions.

Applicant should not recover expenses that are speculative, have not been shown to be reasonable *and necessary*, and thus are not in the public interest.¹⁶

In support of its overall contention, Applicant notes that none of the time estimates or the billing rates on the rate case expenses were challenged or disallowed. This statement is not entirely correct. The ALJ recommends disallowance of the estimated costs related to Motions for Rehearing, agreeing with the ED's analysis of the issue.¹⁷ Furthermore, the ED does not challenge the specific billing rates but the appropriateness of forcing utility customers to pay for speculative costs as outlined above.

In summary, the ED respectfully asserts that the Applicants inclusion of anticipated costs for Motions for Rehearing is improper, not in the public interest, against TCEQ rules and statutes, and thus should be denied.

II. APPLICANT'S ASSERTION REGARDING THE IMPOSSIBILITY OF IMPLEMENTATION OF TCEQ RULES REGARDING DISALLOWANCE OF RATE CASE EXPENSES AFTER A VALID SETTLEMENT OFFER IS WITHOUT MERIT.

The Applicant does not dispute that a written settlement offer was submitted in October 2008, and further that the TCEQ rule 291.28(9) is a validly adopted rule, but incorrectly asserts that implementation is impossible to achieve.¹⁸ This is based on an incorrect assumption that the

¹⁶ The ED acknowledges the Applicant's argument regarding the fact that Protestants could file a motion for rehearing, but reiterates the point that allowing recovery of rate case expenses where an applicant has not met its burden to show that the rates are just and reasonable, as the ED asserts in this case, would not be in the public interest. See Executive Director's Replies to Closing Arguments at 11-12.

¹⁷ The ALJ essentially recites the ED's argument on this topic concluding that the ALJ finds that Decker's requested rate case expenses should be reduced by \$800, from \$30,197.23 to 29,397.23. PFD at 50.

¹⁸ Exceptions of HHJ, Inc. DBA Decker Utilities at 4. The ED notes that the applicable rule has only been effective for two and one-half years and because most of the contested utility rate making proceedings settle, not requiring Commission consideration, the necessity for application of this rule may not have arisen. TCEQ published adoption

trier of fact and law must learn the specific terms of the settlement offer to apply the rule.¹⁹ However, the rule states "A utility may not recover any rate case expenses incurred after the date of a written settlement offer by all ratepayer parties if the **revenue generated** by the just and reasonable rate determined by the commission after a contested case hearing is less than or equal to the **revenue that would have been generated** by the rate contained in the written settlement offer."²⁰ The trier of fact would need to know the following information to determine if rate case expenses should be disallowed pursuant to 291.28(9).

1. The date of the written settlement offer;
2. The revenue that would be generated by the settlement offer; and
3. The amount of rate case expenses incurred after the date of the written settlement offer.

As noted above, the Applicant does not dispute that the Protestants made valid settlement offers. However, it appears that only the March 20th settlement offer was in writing, as required by 291.28(9).²¹ The Applicant provides some evidence as to the rate case expenses claimed in this application by way of estimated expenses as outlined within the Applicants replies to Closing Arguments, and invoices attached to that document.²² The only piece of information not provided as part of the contested case hearing is the revenue requirement that would be generated as a result of the specific settlement offer amounts. The ED has calculated the revenue that

of amendments and additions to TCEQ rules including 30 TEX. ADMIN. CODE § 291.28 on September 22, 2006. 31 TEX. REG. 8106. (September 22, 2006).

¹⁹ *Id.*

²⁰ 30 TEX. ADMIN. CODE § 291.28(9). Emphasis Added.

²¹ In the ED's Response to Replies to closing arguments, the ED indicated that the Protestants submitted written settlement offers to the Applicant on both October 14, 2008 and October 20, 2008. The ED finds that only the October 20th offer was in writing and thus requests this correction to the record.

²² The amount is based on the estimated expenses noted on page 10 of HHJ's Replies to Closing Arguments, an invoice dated December 15, 2008 from the Law Offices of Mark H. Zeppa P.C, pages 2-4 as attached to the Applicant's Replies to Closing Arguments, and the invoice dated October 22, 2008, from B&D Environmental also attached to the Applicant's Replies to Closing Arguments.

would be generated by the settlement offers for water and sewer using the appropriate number of connections or connection equivalents²³ The resulting revenue generated is as follows: for water the revenue generated by the settlement proposal would be \$232,676; and for sewer, the revenue generated by the settlement proposal would be \$462,696. Therefore, the ED asserts that Commission has all of the information necessary to determine if 30 TAC § 291.28(9) is triggered and can apply the rule accordingly. Finally, the ED asserts that if the Commission adopts water or sewer rates that trigger application of 291.28(9) any rate case expenses after October 20, 2008 should be denied.²⁴

III. CONCLUSION AND PRAYER

For the foregoing reasons, the ED respectfully requests that the Commission adopt the ALJ's recommendations' regarding disallowance of costs related to motions for rehearing, set water and sewer utility rates that are just and reasonable based on reasonable and necessary costs and expenses that are supported by proper documentation as recommended by the ED, and approve only those rate case expenses that are proper in accordance with all applicable Texas Water Code provisions and TCEQ rules.

²³ This number is based on the number of sewer connections and water connection equivalents in the Applicant's test year.

²⁴ The ED notes that because two separate rates are being considered, the Commission could adopt either a water or a sewer rate that triggers this rule and thus if only one rate triggers the rule, the ED asserts that one half of the rate case expenses incurred after October 20, 2008 should be denied.

Executive Director's Replies to Exceptions to the PFD
Rate/Tariff Change Application of HHJ, Inc. dba Decker Utilities
Page 8 of 8

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division



Erin Selvera, Staff Attorney
Environmental Law Division
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REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

ATTACHMENT A

**Excerpt of Commission Meeting Discussion Regarding Rate Case Expenses in
Aqua Texas Water and Sewer Utility Rate Case**

Application of Aqua Utilities, Inc. and Aqua Development Company d/b/a/ Aqua Texas, Inc. to Change water and sewer Rates;
TCEQ Docket Nos. 2004-1671-UCR and 2004-1120-UCR;
SOAH Docket Nos. 582-05-2270 and 582-05-2771.

ALJ Bennett: Now we get to rate case expenses. We're getting near the end here. We made a number of disallowances, but on the whole we do recommend recovery of a significant amount of rate case expenses. This was a hotly contested case. The hearing time, you know, two weeks of hearing plus significant legal issues. I mean, came up to the commission on certified questions. This case has been going on for four years and there were well represented Protestants who did a very good job represented by counsel. A lot of issues as you can see. We didn't feel, we looked through the rate case expenses, the attorney's fees and consulting fees and we made adjustments, and reduced some amounts, two hundred and some thousand, but ultimately we do recommend recovery of most of those. And specific amounts obviously will have to be decided. I mean we have the amounts at the time of the PFD, but then we have also post hearing amounts. And we think that's a matter that can be proven up in this interim time period. And then when we come back before you with the actual rates and the surcharge amounts, there may be some disagreement, but we'll be in a position to say here's what we recommend and at that point you can pretty much say ok we'll either take it or not take it or we'll set it at a different amount.

Chairman Garcia: Understood.

Comm. Soward: Let me ask you about the post hearing expenses. Where do you stop the clock?

ALJ Bennett: That's a good question. Ultimately I don't think its clear cut because I think the commission could choose to decide it at what ever point it wants, and tell them, you know, recover these in the future if appropriate. But, I think our approach would probably be to make the Applicant come in and give us a final amount, and say ok this is it, this is what we've spent up to this date. You know, lets say we have a hearing, and here's for two hours at the next commission agenda here's the extra amount to prepare for that and this is it. You know, and come in and present it to you as part of the surcharge. And that will basically cover everything up to that point when you're ready to issue your order. It wouldn't include, obviously, anything if there were appeals of the commission's final order or anything like that.

Excerpt of Commission Meeting Discussion Regarding Rate Case Expenses in Aqua
Texas Water and Sewer Utility Rate Case
Page 2 of 2

Comm. Soward: Oh, I agree there but, you know, if we are going to have another process after today then there's going to be more expenses and then we're going to have another commission meeting, there's going to be more expenses. You're going to have taken evidence up to some point, but then there's going to be more expenses beyond that unless you just take projections, which, you know, I'm not sure I'd be willing to let lawyers project their fees. But, it just seems to me that we need to have some end point to any post hearing rate case expenses, and today seems a reasonable endpoint.

ALJ Bennett: Certainly, if you provide clarification, we would enjoy that. We could (inaudible)

Comm. Soward: Yes (inaudible) next step.

ALJ Bennett: Yes, I think it would. It certainly provides incentives to get things resolved quickly for the next, get to this done.

Chairman Garcia: I'm fine with that. Are you? Today, the clock stops after today?

Comm. Shaw: I would say either today, or at the time that the judge has his get together, one or the other. I don't know if there would be significant prep time that is required of the parties prior to that meeting. It sounds like that's primarily brushing off and finalizing some numbers, so hopefully today would be acceptable. I'm comfortable with that.

Comm. Soward: Today or when? Today.

ALJ Bennett: Ok. That makes it very easy for us. We appreciate that. So then the last issue is getting around to the process....

CERTIFICATE OF SERVICE

This is to certify that the original and seven copies of the foregoing Executive Director's Replies to Exceptions to the Proposal for Decision have been filed with the TCEQ Chief Clerk in accordance with SOAH rules on April 10, 2009.

This is to certify that the Administrative Law Judge, SOAH Docket Clerk, and all parties on the attached Service List have been sent a copy of the foregoing Executive Director's Replies to Exceptions to the Proposal for Decision in accordance with SOAH rules on April 10, 2009.



Erin Selvera
Staff Attorney
Environmental Law Division

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2009 APR 10 AM 10:33

CHIEF CLERKS OFFICE

SERVICE LIST
HHJ, Inc. dba Decker Utilities
TCEQ Docket No. 2008-0164-UCR
SOAH Docket No. 582-08-1719

FOR SOAH

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