

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 7, 2012

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

VIA FACSIMILE NO. 512/239-5533

Re: SOAH Docket No. 582-09-2571; TCEQ Docket No. 2008-0767-UTL-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Aqua Utilities, Inc. a/k/a Aqua Texas, Inc.

Dear Mr. Trobman:

To date, all parties have filed exceptions and replies to exceptions in this case. I have reviewed those filings and I have no changes to make to the Proposal for Decision (PFD) or the proposed order that I have submitted to the Commission. But, I would like to briefly respond to just two points raised by the exceptions.

First, Aqua Texas contends that I erred in concluding that Aqua Texas may have committed a violation by recovering too great an amount of rate case expenses from the 2004 rate case, arguing that my analysis is flawed because Aqua Texas never recovered more in expenses than it incurred during the course of the proceeding. While I agree that Aqua Texas did not recover more than it incurred in the rate change proceeding, this fact was not the basis of my conclusion. My conclusion was based on the notice given in the rate change application. Regardless of what Aqua Texas incurred, I concluded that its rate change notice limited it to recovering only what it had incurred *as of the date of filing the application*. Thus, the issue is not whether Aqua Texas recovered more than it incurred in the course of the proceeding, but whether Aqua Texas—before receiving Commission approval to collect a surcharge—recovered more than those rate case expenses *accrued at the time the application was filed*. The record appears incontrovertibly to show that it did. This, I conclude, would be inconsistent with Aqua Texas's rate change application notice and, thus, a violation of the applicable statutes and rules. For this same reason, also, the filed rate doctrine would not bar an action by the Executive Director (ED), because collecting an amount in excess of the noticed rate change would not be entitled to any deference under the filed rate doctrine. Rather, collecting an amount in excess of the amount set forth in the noticed rate change (prior to Commission approval) would actually violate the proposed filed rates.

Second, the ED excepts to my conclusion that a violation of the 2004 rate change notice is not within the scope of this proceeding. The ED argues that, because the 2004 rate change application was raised as a defense by Aqua Texas, then it is within the scope of the case and can be raised by the ED. To be clear, I did not intend to indicate the ED could not offer evidence or argument to rebut Aqua Texas's defense on the issue. But, my conclusion is that Aqua Texas has essentially established a valid defense by showing that it gave notice of the surcharge in its 2004 rate change application and, therefore, after the rate case expenses from the prior rate case were recovered, Aqua Texas was no longer collecting the surcharge pursuant to that prior rate case. Thus, Aqua Texas established a meritorious defense to the ED's assertion that the surcharge violated the Commission's prior rate order and was an "overcollection" of the rate case expenses from the 2002 rate case order.

The ED has attempted to show that Aqua Texas violated its later "authorization" for the surcharge by exceeding the 2004 rate change notice. While that may be true, the ALJ does not believe that Aqua Texas's action would somehow "nullify" the authorization itself. It would simply mean the authorization had been exceeded. This may be a separate basis for a sanction, but the ED must give notice of it—and could have done so in this case by amending its petition and giving notice of the violation once it learned of information indicating the rate change notice authorization may have been exceeded. But, instead the ED chose to proceed on the basis of its sole contention—that a utility cannot lawfully charge a surcharge for rate case expenses simply by giving notice of it in a rate change application. This was a legal theory I disagreed with in the PFD. Without giving prior notice of its additional legal theories before closing arguments, it is my conclusion that the ED cannot just assert them for the first time in the middle of the hearing or in briefing, thus depriving the utility of an adequate opportunity to conduct discovery and prepare for them.

While the parties have raised many more exceptions, most of those exceptions simply restate their post-hearing closing arguments. Therefore, I find no need to address them further at this time. Rather, I will attend the open meeting at which the Commission considers this matter and will be prepared to answer questions the Commissioners might have at that time.

Sincerely,



Craig R. Bennett
Administrative Law Judge

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: AQUA UTILITIES INC / AQUA TEXAS, INC
SOAH DOCKET NUMBER: 582-09-2571
REFERRING AGENCY CASE: 2008-0767-UTL-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ CRAIG R. BENNETT

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bcoy@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

PAUL TERRILL
ATTORNEY
THE TERRILL FIRM, P.C.
810 WEST 10TH STREET
AUSTIN, TX 78701
(514) 474-9100 (PH)
(512) 474-9888 (FAX)
pterrill@terrill-law.com

AQUA UTILITIES D/B/A AQUA TEXAS, INC.

JENNIFER N COOK
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-1873 (PH)
(512) 239-3434 (FAX)

TCEQ EXECUTIVE DIRECTOR

SCOTT R. SHOEMAKER
ATTORNEY
THE TERRILL FIRM, P.C.
810 WEST 10TH STREET
AUSTIN, TX 78701
(512) 474-9100 (PH)
(512) 474-9888 (FAX)
sshoemaker@terrill-law.com

AQUA UTILITIES D/B/A AQUA TEXAS, INC.

MARSHALL COOVER
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION, MC - 175
P. O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0620 (PH)
(512) 239-3434 (FAX)
mcoover@tceq.state.tx.us

TCEQ EXECUTIVE DIRECTOR
