

**SOAH DOCKET NO. 582-09-2571
TCEQ DOCKET NO. 2008-0767-UTL-E**

IN THE MATTER OF AN	§	BEFORE THE STATE OFFICE
ENFORCEMENT ACTION AGAINST	§	
AQUA UTILITIES, INC. A/K/A AQUA	§	OF
TEXAS, INC.; RN102674215 AND	§	
RN102674504	§	ADMINISTRATIVE HEARINGS

AQUA TEXAS' EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Aqua Utilities, Inc. a/k/a Aqua Texas, Inc. ("Aqua Texas") and files these Exceptions to ALJ Bennett's Proposal for Decision ("PFD") and in support thereof would show as follows.

I. INTRODUCTION

This enforcement case "arises out of a major rate change application" filed by Aqua Texas in 2004, which the Commission approved by Final Order in 2008. PFD at 1. The Administrative Law Judge in this enforcement case, Craig Bennett, properly concluded that the Commission should not impose a sanction in this enforcement case against Aqua Texas. Aqua Texas appreciates the thorough and well-reasoned analysis provided by Hon. ALJ Bennett and respectfully requests that the Commission adopt his recommendation that no penalty or corrective action be assessed against Aqua Texas. Although Aqua Texas agrees with the ultimate conclusion reached by the ALJ, it files these special exceptions to certain aspects of the ALJ's reasoning and to the portions of the PFD that are an impermissible advisory opinion on claims made by the ED that were not plead and therefore not properly before the ALJ. Because those claims were not plead, and thus Aqua Texas was not given fair notice of the claims, nor a fair opportunity to conduct discovery and put on evidence of those unplead claims, the ALJ's discussion of those unplead issues should be removed from the PFD and

Final Order. Otherwise, Aqua Texas agrees with the ALJ's ultimate conclusion that the Commission should not assess a penalty or corrective action against Aqua Texas.

II. EXCEPTIONS TO THE PFD

A. **Analysis regarding the merits of the unplead claims should be removed from the PFD because it is an impermissible advisory opinion.**

Although the ALJ correctly concluded that the ED failed to plead two claims raised in post-hearing briefing, the ALJ nevertheless addressed those two allegations in the PFD.¹ Aqua Texas respectfully recommends that the ALJ's analysis of the merits of those unplead issues be removed from the PFD and Final Order because they are an impermissible advisory opinion.

The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Tex. Assoc. Of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). The prohibition against advisory opinions is rooted in the concept that only live issues or controversies should be decided. *Bexar Metropolitan Water District v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no pet.) (citing *Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex.1988)).

Here, because the ED did not raise the Unplead Claims until post-hearing briefing, those claims were never properly before the ALJ, and therefore any analysis or conclusions pertaining to the merits of those claims should not be discussed or analyzed in the PFD. The ALJ correctly noted that the ALJ is not definitive in finding the violations, but even the tentative discussion and analysis should be removed from the PFD and Final Order. PFD at 6, fn. 7. The Unplead Claims are not a “live” controversy in this case, and are merely “abstract questions of law.” So if the PFD and/or Final Order

¹ Those allegations are: (1) that Aqua Texas violated the 2002 Rate Order by assessing a surcharge authorized by the Order against customers that were not subject to the Order; and, (2) that Aqua Texas violated the law by collecting a surcharge for its 2004 Rate Case expenses in an amount greater than it gave notice to customers in its 2004 Rate Application (collectively, the “Unplead Claims”).

contains analysis pertaining to the merits of those issues, it would be impermissibly advisory. Therefore, Aqua Texas respectfully requests that language addressing the merits of the Unplead Claims in the PFD and Final Order be removed as set out in **Section III. B. *infra***.

B. The Commission’s rules preclude remand of an enforcement case.

After concluding that the ED failed to plead the above-mentioned claims, the ALJ suggested that the ED could amend its petition to advance those allegations. Then, the ALJ suggested that “[i]f the Commission agrees with the ALJ’s findings regarding the lack of notice, but disagrees with the ALJ’s recommendation of no sanction, the Commission does have the authority to reopen the record and remand the matter to allow the ED to correct procedural deficiencies.”

No such authority exists in an enforcement case. 30 TEX. ADMIN. CODE § 80.29(a) states, “[u]p to seven days before the hearing, parties to an enforcement action may file supplemental or amended pleadings, so long as those pleadings do not operate as an unfair surprise to the opposite party. Amendments after that time will be at the discretion of the judge and may constitute grounds for a continuance.” Thus, in enforcement cases, while the ED might have sought leave to amend its petition before seven days prior to the hearing, the ED could not do so afterward. 30 TEX. ADMIN. CODE § 80.29(a).²

Here, the hearing on the merits in this case already occurred. The ED had over 3 years to amend its Petition to include the Unplead Claims, but never did. As a result, the ED cannot amend its pleadings after the full contested case hearing on the merits has finished. Accordingly, Aqua Texas recommends that the ALJ strike any language suggesting the case can be remanded as set out in **Section III. B. *infra***.

² This conclusion is consistent with 30 TEX. ADMIN. CODE § 70.102. Under § 70.102, only pleadings *other than* the ED’s Preliminary Report and Petition might be amended with leave from the ALJ. 30 TEX. ADMIN. CODE § 70.102.

C. No violation on unplead allegations.

As mentioned above, the ALJ properly concluded that the ED did not give fair notice of the Unplead Claims. Aqua Texas further agrees with the ALJ's recommendation that no sanction be applied as a result. However, because the ALJ nevertheless addressed the merits of unplead issues for which Aqua Texas was not given fair notice, and even tentatively stated that it appeared Aqua Texas committed a violation in those instances, Aqua Texas must respond to the merits of those issues. Aqua Texas' response is necessarily limited to the lack of fair notice, inability to conduct discovery on those unplead claims and introduce evidence. But even with those limitations that violate basic notice requirements of due process and fundamental fairness, there is no merit to the ED's Unplead Claims.

1. Aqua Texas did not violate the 2002 Order by collecting a surcharge against customers not subject to the 2002 Order.

The ALJ tentatively states that Aqua Texas essentially modified the terms of the 2002 Order on its own initiative by collecting rate case expenses authorized by the 2002 Order from customers who were not subject to the 2002 Order. And by doing so, the ALJ tentatively states that Aqua Texas violated the 2002 Order's terms.

Aqua Texas disagrees. In this case, the ALJ correctly concluded that Aqua Texas was authorized to notice and collect the Noticed Surcharge pursuant to the 2004 Notices. Steve Blackhurst, the former TCEQ water utilities section manager and Aqua Texas representative who prepared the notices, testified that he designed the 2004 Notices consistent with the single most important issue in the 2004 Rate Case - regionalization. Tr. at 399:23-401:3 (Blackhurst, May 25, 2011).³ Like every other regionalized rate structure, Aqua Texas noticed its intent to collect the

³ See also, Tr. 417:10-15 (Stephen Blackhurst, May 25, 2011) (Blackhurst testified that the ED in the 2004 Rate Case supported regionalizing all of Aqua Texas' rates, and specifically recommended that surcharges be spread among all of Aqua Texas' customers).

Noticed Surcharge from *all* Aqua Texas customers, just as it did with every other rate or charge in the 2004 Rate Application. *See* Tr. at 407-409 (Stephen Blackhurst, May 25, 2011). The language in the 2004 Notices clearly stated, “In this application, we are proposing to continue the \$0.85 rate case expense surcharge now to be applied to *all of our Aqua Texas customers.*” AT-1 (Aqua Texas’ 2004 Application for a Rate/Tariff Change) (emphasis added); Tr. at 409:8 - 410:4 (Stephen Blackhurst, May 25, 2011). Mr. Blackhurst testified the 2004 Notices were clear that rate case expenses were going to be charged to all Aqua Texas customers through an \$0.85 surcharge until the expenses for the 2004 Rate Case were recovered. Tr. at 430:8-21 (Stephen Blackhurst, May 25, 2011).

Like every other rate that was in effect pursuant to the 2002 Order, Aqua Texas changed the rates it charged its customers pursuant to the 2004 Rate Application. Aqua Texas charged the rates noticed in the 2004 Rate Application, including the Noticed Surcharge, 60 days after the Application was filed and the ED declared the Application administratively complete. Those noticed rates were charged to all of Aqua Texas’ customers on a regional basis. Therefore, Aqua Texas properly noticed its intention to charge all customers, pursuant to the 2004 Rate Application, then it proceeded to regionalize that charge to all customers.

Further, Aqua Texas’ initiative was not without its checks. The ED had an affirmative duty to review the 2004 Rate Application and Notices. Once the ED determined that the 2004 Rate Application was administratively complete, Aqua Texas was authorized to charge the rates as noticed in the Application. Because Aqua Texas noticed its intention to charge “all of our Aqua Texas customers” consistent with its regional approach, and the ED declared the 2004 Rate Application administratively complete, Aqua Texas had every reason to believe it was authorized to charge the Noticed Surcharge to all of its customers.

It is also worth noting that there was no harm to Aqua Texas' customers. Aqua Texas did not charge any customers two \$0.85 surcharges for the same service (*i.e.* one under the 2002 Order and one pursuant to the 2004 Notices). Coupled with the undisputed fact that Aqua Texas never collected more than it incurred, and the amount collected was almost \$2 million dollars less than what the Commission approved in the 2008 Final Order, no violation should be found, nor should Aqua Texas be penalized.

Finally, finding a violation in this instance would conflict with typical utility practice that historically has not been considered a violation. A truism of providing utility service is that customers come and go. Some new customers pay surcharges in effect even if they were not part of the original proceeding. Similarly, those who are no longer customers are not required to pay remaining surcharges they would have paid if they continued receiving service. If the Commission agrees that this practice is a violation, then additional review of this policy outside the scope of this case is warranted, not a violation against Aqua Texas.

2. Aqua Texas did not collect a surcharge in an amount greater than it provided for in its notice to customers in its 2004 Rate Application.

Regarding the second unplead claim, the ALJ also tentatively stated that Aqua Texas may have violated TEX. WATER CODE § 13.187 by continuing to collect the Noticed Surcharge after it had collected \$167,000, the amount it had incurred as of the date the 2004 Notices were circulated. The ALJ noted that this issue hinges on the meaning of the "incurred to date" language found in the 2004 Notices, and that such language should be read to mean the date the application was filed. Finally, the ALJ stated that by failing to abide by the terms of the 2004 Notices, Aqua Texas may have committed a violation.

Aside from the fact that the issue was not plead, thus *not* properly before the ALJ, there are a number of problems with the ALJ's conclusion. First, it does not account for the undisputed fact

that Aqua Texas never collected more than it incurred. Consistent with Mr. Blackhurst and Mr. Scheibelhut's testimony, Ms. Pascua acknowledged that Aqua Texas had incurred substantial rate case expenses by the time Aqua Texas filed the 2004 Application. AT-B at 20:4-14; AT-C at 19:14-20; 20:11 - 21:11 (Scheibelhut Prefiled); AT-32 (Comparison of 2004 Rate Case Expenses). Ms. Pascua also acknowledged that, at the rate case expense hearing in the 2004 Rate Case, Aqua Texas submitted evidence that it had incurred about \$2.7 million in rate case expenses. Tr. at 122:9-20 (Elsie Pascua, May 5, 2011). Further, it is undisputed that Aqua Texas incurred substantial rate case expenses — well over two million — by the time Aqua Texas began charging the Noticed Surcharge in February 2007. AT-22 at 63:10-21 (Transcript of Deposition of Elsie Pascua); Tr. 120:18 - 121:1 (Elsie Pascua, May 5, 2011). Moreover, at the evidentiary hearing, Ms. Pascua conceded that, as a good faith effort to resolve this dispute, Aqua Texas did not implement the fourth phase of its noticed rates and stopped collecting the surcharge even though the matter had not been fully adjudicated. Tr. 207:19-23; 111:22-25 (Elsie Pascua, May 5, 2011). Moreover, Ms. Pascua admitted that the amount that Aqua Texas would have collected under its fourth phase increase for the Southwest water and sewer and the southeast water and sewer far exceeds the amount of the Noticed Surcharge — maybe even by an order of magnitude. Tr. 114:14-19; 207:1-7 (Elsie Pascua, May 5, 2011).

Second, the ALJ's conclusion fails to account for *all* of the 2004 Notices' language. When each 2004 Notice is read as a whole, it is clear that Aqua Texas' intent was to collect what had been incurred once collections began after the 2002 Order collections concluded. The 2004 Notices state, in pertinent part:

In this application, we are proposing to continue the \$0.85 (85 cent) rate case surcharge, now to be applied to all of our Aqua Texas customers, until all of the

expenses from the prior rate case are recovered and *until the expenses from the current case are recovered*.⁴

So, a closer review of the 2004 Notices shows that Aqua Texas did not intend to limit the Notice Surcharge to rate case expenses incurred at the time of filing the application. Tr. 409:8-411:11 (Stephen Blackhurst, May 25, 2011).⁵

In sum, the ALJ's conclusion, which hinges on one of two possible interpretations as to what "incurred to date" means, and whether the Notices should be read as a whole or in select portions, is insufficient to establish a violation in this case. Again, because the claim was not plead, this issue was not before the ALJ and is not before the Commission, and should not be part of the PFD or Final Order. But if it is, Aqua Texas respectfully requests the Final Order reflect that Aqua Texas did not commit a violation.

D. Res Judicata and Collateral Estoppel bar the ED's recovery in this case.

As set out above, Aqua Texas agrees with the ALJ that Aqua Texas did not commit a violation based on the plead claims. Further, Aqua Texas agrees that the ED failed to properly plead the Unplead Claims, and therefore no sanctions should be imposed as a result. However, even if the Unplead Claims were properly before the ALJ, Aqua Texas disagrees with the ALJ's conclusion that res judicata and collateral estoppel do not bar the ED's recovery in this case.

The ALJ concluded that neither res judicata nor collateral estoppel precluded the ED from recovering in this enforcement action because the requirement that the issue either have been litigated

⁴ AT-1 at 103241; 103275; 103301; 103335; 103344; 103355; 103364; 103374; 103383; 103395 (Aqua Texas' 2004 Application for a Rate/Tariff Change).

⁵ This notice language contains no limitation on the recovery of expenses "to date" and if the ED perceived such a conflict, it was incumbent upon the ED to raise that at some point during the 4½ years of the 2004 Rate Case. Mr. Blackhurst testified that under the context of what happened in the 2004 Rate Case, the more reasonable interpretation was that "incurred to date" means the date collections began. See Tr. 407:21-411:9 (Stephen Blackhurst, May 25, 2011).

(collateral estoppel) or could have been litigated (res judicata) in the prior action was not met. Aqua Texas disagrees for the reasons set out below.

1. Res Judicata

In the PFD, the ALJ reasons that an enforcement action is an entirely different animal than a rate case, and that the ED could not have brought an enforcement action within the rate case itself.

Aqua Texas disagrees. Res judicata applies if the issue *could* have been litigated in the prior proceeding. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Thus, Texas courts look to the underlying operative facts to determine whether the new claim is encompassed within those underlying facts. So, the relevant inquiry is not what type of action it is, it is what issues/facts are being litigated.

The ED had numerous opportunities to object to the Noticed Surcharge during the four and a half years the 2004 Rate Case was litigated. TEX. WATER CODE § 13.187(l) states that “at any time during the pendency of the rate proceeding the regulatory authority may fix interim rates in effect until a final determination is made on the proposed rate.” TEX. WATER CODE § 13.187(l). Likewise, 30 TEX. ADMIN. CODE § 291.29(b) states that “[a]t any time after the filing of a statement of intent to change rates . . . the executive director may petition the commission or judge to set interim rates until . . . a final determination is made.” 30 TEX. ADMIN. CODE § 291.29(b). Thus, the ED could have moved for interim rates different than Aqua Texas’ noticed rates at any time after Aqua Texas filed its application, until the Commission issued a final order. AT-B at 27-28 (Blackhurst Prefiled).

Therefore, the ED could have asked the ALJs to completely disallow the Noticed Surcharge. The ED has done exactly that before — and successfully — when it did not approve of an applicant’s noticed rates. AT-24 (Buena Vista Motion for Interim Rates); AT-25 (Monarch Motion for Interim Rates). For example, in *Buena Vista*, the ED successfully moved for **\$0.00** in interim rates to

completely eliminate a *noticed surcharge* the applicant wanted to collect in the interim that the ED concluded was unjust. AT-24 (Buena Vista Motion for Interim Rates); AT-B at 28-29 (Blackhurst Prefiled).

Further, several protestants in the 2004 Rate Case took advantage of that same opportunity and asked the ALJs to suspend Aqua Texas' noticed rates. AT-12 (Order Denying Request for Interim Rate Relief). The ED never joined in their motion or moved for its own version of interim rates. On April 19, 2005, the ALJ's denied all of the requests for interim rate relief. AT-12 (Order Denying Request for Interim Rate Relief).

But that was only the second among countless opportunities that the ED had to dispute the Noticed Surcharge in the 2004 Rate Case before the Commission issued the 2008 Order. Ms. Pascua and Ms. Benter each testified that there were plenty of times the ED could have challenged the Noticed Surcharge in the 2004 Rate Case. Tr. 139:9-18; 132:22 - 133:13; 134:8-16 (Elsie Pascua, May 5, 2011); Tr. 543:6-9 (Tammy Benter, May 25, 2011). Indeed, at any time before the Commission issued the 2008 Order in this case, the ED could have:

1. Refused to declare the 2004 Application administratively complete after reviewing Aqua Texas' Notices (30 TEX. ADMIN. CODE § 291.8, Exhibit 1 to Aqua Texas' Closing Argument at 6 (Deer Creek Notice of Deficiency)⁶;
2. Moved to suspend the rates until Aqua Texas amended its application to removed the Noticed Surcharge. 30 TEX. ADMIN. CODE § 291.26(a).;
3. Moved for interim rates to remove the Noticed Surcharge (TEX. WATER CODE § 13.187(l); 30 TEX. ADMIN. CODE § 291.29(b); Tr. 388:24 - 389:14

⁶ While the facts behind the Deer Creek Ranch Cases are dissimilar to this case, they do showcase two ways the ED could have addressed the Noticed Surcharge in the 2004 Rate Case. In response to Deer Creek's noticed rate case expense surcharge for its 2011 rate case, the ED: (1) issued a notice of deficiency letter to remove an undesired noticed surcharge as a prerequisite to obtaining a declaration of administrative completeness; *and* (2) successfully moved for interim rates to remove disallow the surcharges out of fear they *might* prove to be unreasonable. Exhibit 1 to Aqua Texas' Closing Argument.

(Stephen Blackhurst); *See* Exhibit 1 to Aqua Texas' Closing Argument (ED's Petition for Interim Rates);⁷

4. Asked for a certified question on this issue (30 TEX. ADMIN. CODE § 80.131);
5. Sought disallowance of the Noticed Surcharge via pre-filed testimony (Tr. 136:1-9 (Elsie Pascua, May 5, 2011));
6. Sought disallowance at the hearing on the merits;
7. Sought disallowance at the rate case expense hearing;
8. Objected to the Noticed Surcharge in its closing arguments (TEX. WATER CODE § 13.187(l); 30 TEX. ADMIN. CODE § 291.29(b));
9. Sought a disallowance of the Noticed Surcharge in the Exceptions to the PFD (*Id.*);
10. Joined the Southeast and Southwest Region ratepayer groups in their objection to the Noticed Surcharge (Tr. 555:9-16 (Tammy Benter, May 25, 2011));
11. Objected to the Noticed Surcharge when briefing the Commission on whether to adopt the PFD (TEX. WATER CODE § 13.187(l); 30 TEX. ADMIN. CODE § 291.29(b));
12. Requested that the Commission disallow and require refunds of any collected amounts of the Noticed Surcharge as part of its 2008 Final Order (TEX. WATER CODE § 13.187(l); 30 TEX. ADMIN. CODE § 291.29(b); *see also* Exhibit 2 to Aqua Texas' Closing Argument).; or
13. Almost *any* of the above, at *any* time before the Commission issued the 2008 Order (Tr. 543:6 - 544:16 (Tammy Benter, May 25, 2011)).

As set out above, the ED had countless opportunities to litigate the Noticed Surcharge issue. As a result, res judicata applies and precluded the ED's recovery in this case.

2. Collateral Estoppel bars the ED's recovery in this case.

The ALJ concluded that collateral estoppel did not bar the ED's recovery in this case because the first element, *i.e.*, that the Noticed Surcharge was fully and finally litigated in the 2004 Rate Case,

⁷ AT-25 (Monarch's Motion for Interim Rates).

was not met. Aqua Texas disagrees. Aqua Texas' authority to collect the Noticed Surcharge was explicitly raised during the 2004 Rate Case. AT-13 (Southeast Region's and Southwest Region's Response to Order Number 51). . See ED's Preliminary Report and Petition; AT-1 (Aqua Texas' 2004 Application for a Rate/Tariff Change). In the Southeast and Southwest Region's Response to Order No. 51, the protestants argued that Aqua Texas was not authorized to collect the Noticed Surcharge and tried to characterize the surcharge as an "overcollection" of the surcharge from the prior rate case. *Id.* at 3. The protestants further requested that "Aqua Texas be ordered to refund the overcollections to date both from the surcharge in the prior rate case and the phased rates charged in this case." *Id.* at 8.

Further, at the evidentiary hearing, Roger Lampman testified that he was the president of Falling Water POA during 2004 Rate Case, and that the Falling Water POA was part of the "Southwest Region Homeowner's Group," protestants in the 2004 Rate Case. Tr. 17:11 - 18:11 (Roger Lampman, May 5, 2011). Then, Mr. Lampman explicitly testified that the problem his group complained about in the 2004 Rate Case is the same problem in this enforcement case. Tr. 22:21 - 23:7 (Roger Lampman, May 5, 2011). At the evidentiary hearing, the ED's chief witness on direct, Elsie Pascua, admitted that the argument that the Southwest Region Homeowner's Group made in AT-13 was made during the 2004 Rate Case, and that it was the same argument as the ED's in this enforcement case — that Aqua Texas overcollected the \$0.85 surcharge from the 2002 order. Tr. 145:20-23; 146:17-24 (Elsie Pascua, May 5, 2011). Ms. Pascua also admitted that while the Southeast and Southwest Region groups did not prevail on that argument, they certainly had the opportunity to. Tr. 146:25 - 147:5 (Elsie Pascua, May 5, 2011).

Finally, in early briefing in this case, the ED implicitly acknowledged that it “sufficiently” raised the surcharge issue as part of rate case expenses. ED’s Initial Briefing on Jurisdictional and Procedural Issues at 21. Thus, the ED essentially conceded the first element of collateral estoppel.

In sum, as set out above, the Noticed Surcharge issue was specifically raised in the 2004 Rate Case and was fully and fairly litigated. Accordingly, collateral estoppel barred the ED’s recovery in this case.

E. The Noticed Surcharge was presumed reasonable and was legally effective during the 2004 Rate Case pursuant to the Filed Rate Doctrine.

While the PFD discussed res judicata and collateral estoppel, it did not discuss another reason the ED’s action in this case was barred — the “filed rate doctrine.” The filed-rate doctrine applies when state law creates a state agency and a statutory scheme under which the agency determines reasonable rates for the service provided. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211 (Tex. 2002); *see also Southwestern Bell Telephone Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex.App.–Houston[14th Dist.] 1996, pet. dismiss’d) (noting that the filed-rate doctrine has been extended across the spectrum of regulated utilities). Under the filed-rate doctrine, a tariff filed with and approved by an administrative agency under a statutory scheme is presumed reasonable unless proven otherwise. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211. Further, filed tariffs have the force and effect of law until suspended or set aside. *Id.* Moreover, the doctrine even precludes the rate-setting body (e.g., TCEQ in this case) from altering filed and approved rates retroactively. *See Southwestern Bell Telephone Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687 at 692.

Here, TCEQ is subject to the filed rate doctrine because it is charged with determining reasonable rates for water and wastewater service. Once Aqua Texas’ noticed rates (including the Noticed Surcharge) became effective, they became Aqua Texas’ filed rates. Therefore, Aqua Texas’

filed rates were presumed reasonable until proven otherwise, and had the full force and effect of law until suspended or set aside. The rates in the 2004 Rate Application – including the Noticed Surcharge — were neither suspended nor set aside. Therefore, the ED — and the TCEQ as well — is precluded from challenging Aqua Texas filed rates (interim and final) retroactively with this enforcement case.

F. The case should not be remanded.

As set out above, Aqua Texas did not commit a violation of either the plead or Unplead Claims. Further, this case was barred by res judicata and collateral estoppel. Accordingly, there is no reason to remand the case for further proceedings. But those reasons aside, the circumstances of this case suggest that this matter should not continue any further.

This case has been pending for over three years and, to borrow the words of the ALJ, it “arises out of a major rate change application filed by [Aqua Texas] in 2004.” PFD at 1. In other words, the subject matter of this case has been pending before the TCEQ for almost *eight years*. It is time for all issues related to the 2004 Aqua Texas rate case to end.

At any time during the four and a half years that Aqua Texas’ 2004 Rate Application was pending before the Commission, the ED could have raised its complaint about the Noticed Surcharge. As noted above, there were numerous opportunities to do so. Moreover, the issue was explicitly raised by the two major protestant groups, but the ED declined to bring the issue to the Commission’s attention, despite the ED’s actual awareness of the issue.

At any time during the three years of this enforcement case, until seven days before the hearing, the ED could have amended its Petition to include the Unplead Violations. The ED never did. Aqua Texas has already dedicated significant financial and legal resources to defend itself in this case. The ED has likely spent significant state resources prosecuting this case as well.

The ALJ correctly noted that Aqua Texas never had notice of the Unplead Claims, and as a result, would be entitled to additional discovery, briefing, and an additional hearing on the merits on those issues as well.⁸ And if the Commission remands this case to give the ED yet another bite at the apple, the case might continue for another three years. Even assuming for the sake of argument that the ED is 100% successful, recovery would be limited to a couple-thousand-dollar penalty and a mark on Aqua Texas' compliance history.

Further, as established in the hearing, Aqua Texas applied the collected amount of the Noticed Surcharges to the rate case expenses approved under the 2008 Final Order and has finished collecting all rate case expenses from the 2008 Final Order. Aqua Texas has filed two rate cases since this enforcement case began, has not employed a Noticed Surcharge, and does not intend to in the future. As a result, the practice the ED disapproves of is no longer occurring.

It is time for this case to end. Therefore, Aqua Texas respectfully requests that the Commission adopt a Final Order that not only precludes remand, but stops continued litigation of the 2004 Rate Application and its Noticed Surcharge.

III. PROPOSED CORRECTIONS

A. Proposed Final Order Corrections

For the reasons set out above, Aqua Texas respectfully recommends the following changes be made to the Proposed Final Order:

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|-----------------------------|--|
| Conclusion of Law 9 | Delete. |
| Conclusion of Law 11 | Delete "at this time" from the first sentence. |
| Conclusion of Law 12 | Delete "at this time" from the sentence. |

⁸ If the matter is remanded, Aqua Texas reserves all rights it has in defending against the unplead violations.

B. Proposed Corrections to the Proposal for Decision

For the reasons set out above, Aqua Texas respectfully recommends the following changes be made to the Proposal for Decision:

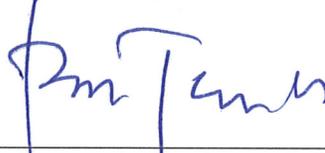
- Amend page, 2nd Par., 3rd Sent. to read: Second, although the ED seeks recovery for two additional alleged violations, those violations are not within the scope of the ED’s notice of violation (NOV) or current pleading — the ED’s Second Amended Preliminary Report and Petition (the Petition).
- Delete the 3rd Sent., 2nd full par. in Section B.3 on p. 5 beginning with: “However, in 2004, it began . . . terms of the 2002 Rate Order.”
- Delete the last two sentences in the 1st full par. on page 6, found in Section B.4., beginning with: “In particular . . . likely a violation.”
- Delete the last five sentences in the 2nd full paragraph of page 8, beginning with: “As the notice . . . were fully collected.”
- Delete the 1st sentence in the first full paragraph on page 9, beginning with “However, in the 2004 Rate Case itself . . . Instead.”
- Amend the 1st sentence of the second full paragraph on page 15 to read: “Although the evidence was introduced during the hearing regarding the two violations
- Delete “at this time” on the second line of page 16.
- Delete the last sentence of the 1st full paragraph on page 16.
- Delete Sections IV. D. and E, pp. 24-28.
- Delete footnote 51 on page 34.

IV. CONCLUSION & PRAYER

After considering the foregoing, Aqua Texas respectfully requests that the Commission adopt the ALJ’s PFD and issue the ALJ’s Proposed Final Order with the changes discussed herein. Aqua Texas further requests all other and further relief to which it may be entitled at law or in equity.

Respectfully submitted,

THE TERRILL FIRM, P.C.

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on January 13, 2011, a true and complete copy of the above was sent by facsimile to counsel of record at the following addresses:

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