

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

**IN THE MATTER OF AN
ENFORCEMENT ACTION AGAINST
AQUA UTILITIES, INC. A/K/A AQUA
TEXAS, INC.; RN102674215 AND
RN102674504**

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**BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS**

**AQUA TEXAS' REPLY TO THE ED'S
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 this Reply to the ED's Exceptions to ALJ Bennett's Proposal for Decision ("PFD") and in support thereof would show as follows.

I. INTRODUCTION

Administrative Law Judge Craig Bennett correctly concluded that the ED failed to prove the claim in the ED's Petition and that Aqua Texas should not be sanctioned in this case. For almost three years, the ED's complaint in this case centered entirely on the allegation that Aqua Texas was not authorized to continue charging an \$0.85 surcharge authorized by the Commission in its 2002 Order. As the ALJ's thorough PFD explains, the ED failed to prove that allegation. The PFD also rejected two other post-hearing claims made by the ED because those claims were not plead and, thus, Aqua Texas was not given fair notice of those claims. The ED has now filed 33 pages of Exceptions to Judge Bennett's PFD. The Exceptions are a mish-mash of post-hoc rationalizations and shifting rationales — inconsistently applied.

This enforcement case has been pending for over three years. As ALJ Bennett, the ALJ that handled both the underlying rate case and this enforcement case put it, this case "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. The ED's Exceptions lack merit and should be rejected in their entirety. The Commission should issue a final order approving the ALJ's recommendation that no sanction be imposed against Aqua Texas and finally ending the 2004 Aqua Texas rate case.

II. ARGUMENTS AND AUTHORITY

A. The ALJ correctly determined that the ED failed to plead two claims.

In the PFD, the ALJ correctly concluded that the ED attempted to raise two additional claims that were beyond the scope of the ED's Petition, and therefore should not be considered. PFD at 10-16. Briefly stated, the ED disagrees, and argues that it gave a short, plain statement of the matters asserted consistent with the APA, and therefore the Unplead Claims were "encompassed within" the ED's Petition.

The APA requires that a party be given reasonable notice of a hearing, and that the notice of the hearing contain a "short, plain statement of the matters asserted." TEX. GOV'T CODE §§ 2001.051 and 2001.052.¹ Under the standard set out in §§ 2001.051 and 2001.052, as set out below, the ED's Petition fails to satisfy §§ 2001.051 and 2001.052 because the ED's Petition contains no statement at all of the Unplead Claims.

1. The ED's Petition speaks for itself — the only issue raised by the ED was the continuation of the \$0.85 surcharge.

The ED argues it "alleges only one violation in this case - that Aqua Texas charged an unauthorized \$0.85 monthly surcharge in violation of law and its tariff at the time by continuing

¹ The Due Process and Due Course of Law Clause of the U.S. and Texas Constitutions provide additional procedural safeguards as well.

to charge an \$0.85 monthly surcharge beyond what was authorized.” The ED’s Petition does contain one allegation. However, that allegation is the following:

“Aqua Utilities violated 30 TEX. ADMIN. CODE § 291.21(a), TEX. WATER CODE § 13.135, and TCEQ Order, Docket Nos. 2000-1074-UCR and 2000-1775-UCR, Ordering Provision No. 3, by failing to comply with the approved tariff on file with the TCEQ by directly charging and collecting s surcharge that has exceeded the terms of the tariff. Specifically, TCEQ Docket Nos. 2000-1074-UCR and 2000-1775-UCR authorized Aqua Texas to collect a surcharge for each applicable water and sewer connection to recover rate case expenses totaling \$2,055,424.82. After Aqua Utilities had collected the total recoverable amount authorized by the TCEQ, Aqua Utilities *continued to collect the surcharge.*”

AT-14 (ED’s Preliminary Report and Petition) at 2, ¶5 (emphasis added) ED’s First and Second Amended Preliminary Reports and Petitions. The ED’s complaint centered solely on Aqua Texas continuing to charge the \$0.85 surcharge after it collected the full amount authorized by the 2002 Order. For that reason *alone*, the ED claimed Aqua Texas violated the Water Code and Commission’s rules. See AT-14 (ED’s Preliminary Report and Petition) at 2, ¶5 (emphasis added); ED’s 1st and 2nd Amended Preliminary Reports and Petitions.

By its plain language, the Petition says nothing about who the 2002 surcharges were collected from, or whether Aqua Texas complied with the 2004 Notices’ language. According to the ED’s own witnesses in this case, that fact cannot be disputed. ED-3 at 4 (Pascua Prefiled); Tr. 57:4-12 (Elsie Pascua, May 5, 2011); Tr. 253:18 - 236:3 (Rebecca Clausewitz, May 6, 2011); Tr. at 395:23-396:4. In her prefiled testimony, Ms. Pascua confirmed there was only one allegation in this case, and when asked to specify the allegation, Ms. Pascua pointed to the rate case expenses authorized by the 2002 Order and testified that “Aqua Texas finished recovering the full \$2,055,424.82, yet continued to charge the \$0.85 monthly surcharge after it had collected the entire amount authorized by the 2002 Order. Ex. ED-3 at 4:26-28 (Pascua Prefiled). Similarly, when asked to describe Aqua Texas’ violation in her prefiled testimony, the ED’s

enforcement coordinator, Rebecca Clausewitz testified that the 2002 Order authorized Aqua Texas to recover more than \$2 million in rate case expenses, and that “as of October 2006, the Respondent had collected the total recoverable amount authorized by the Commission [in the 2002 Order], yet the Respondent continued to collect the surcharge until January 31, 2008.” Ex. ED-4 at 6 (Clausewitz Prefiled).

The ED filed an original and two amended petitions, two briefs regarding summary disposition and jurisdictional issues, prefiled testimony for four witnesses, and numerous other pleadings. None of them give any indication whatsoever that the ED would raise the Unplead Claims against Aqua Texas. This case has never been about who paid the surcharge, or whether Aqua Texas over-collected based on the 2004 Notices’ “incurred to date” language. It is clear the ED did not raise the Unplead Claims in its Petition. Therefore, the ALJ correctly found that the ED could not raise these claims for the first time in Closing Arguments.

2. The ED never complained about who paid the \$0.85 surcharge.

Because the ED’s Petition only complained about the *continuation* of the \$0.85 surcharge, the ED has attempted to cobble together after-the-fact rationalizations for this new claim. The ED now claims that its Petition “encompasses a violation for improperly charging the \$0.85 surcharge to recover 2002 rate case expenses to customers not covered by the 2002 Order.” That argument lacks merit for at least three reasons. First, the Petition’s plain language only challenged Aqua Texas’ continued collection of the surcharge after rate case expenses in the 2002 Order had been fully collected — not *who* Aqua Texas collected it from. There is not one single word in the Petition — or any of its amendments — that complains about which customers were being charged the \$0.85 surcharge. The ED’s complaint centered on the continuation of the surcharge. This point is further underscored by noting that the ED’s arguments do not cite a

single sentence from the Petition that complains about which customers were charged the \$0.85 surcharge.

Second, the ED's prefiled testimony confirms that it was the continuation of the surcharge that was the ED's complaint. Although the ED filed 57 pages of prefiled testimony for four witnesses, and approximately 717 pages of exhibits, there is not a single complaint in the ED's prefiled testimony and exhibits about who was paying the surcharge. The complaint is centered on the continuation of the surcharge after the rate case expenses from the 2002 Order were collected. This fact can be easily verified by reviewing the ED's prefiled testimony which even conveniently labeled the continuation of the \$0.85 surcharge the "Extended Surcharge."

Third, the ED's own enforcement coordinator in this case, Rebecca Clausewitz, specifically testified that the ED was *not* complaining about who the surcharge was being collected from. On the second day of the hearing, the ALJ and Rebecca Clausewitz had the following question and answer sequences:

Q So I understand your testimony to be that you focused solely on the 2002 Order and Aqua Texas' collections under it?

A That's correct.

Tr. at 249 (Rebecca Clausewitz, May 6, 2011).

Q Well, I guess what I'm trying to find out is, is the ED specifically contending that regardless of the amount, the surcharge was collected improperly from people who should not have been paying a surcharge?

A Well, no. What we're contending is that there was a violation of the 2002 rate order, which authorized a set amount to be collected. And as soon as they continued to collect the surcharge, that they – they went above the set amount that was in the order, then there was a violation of the order.

Q Right. So the ED's allegations and investigation focus have not been on specifically who the surcharge was being collected from, but when and how much was being collected. Is that correct?

A That's correct.

Tr. at 253:7-21 (Rebecca Clausewitz, May 6, 2011).²

After the ALJ raised the issue *sua sponte*, Aqua Texas made it clear that the ED never raised that issue and that Aqua Texas had never been given notice of that claim. Mr. Blackhurst testified that he was not aware of the ED complaining about anything *other* than the fact that the Noticed Surcharge was charged after the rate case expenses under the 2002 Order were fully collected. Tr. at 395:23 - 396:4 (Stephen Blackhurst, May 25, 2011). He further observed that there was no reference to which customers are paying the noticed Surcharge in the August 3, 2007 Notice of Violation letter, that the ED took the position that the 2004 Notice did not authorize the Noticed Surcharge in the ED's Notice of Enforcement letter, and that the letter said nothing about which customers were paying it. Tr. at 391:11-13; 393:16-19; 394:9-23 (Stephen Blackhurst, May 25, 2011). Mr. Blackhurst also noted that none of the ED's Petitions or prefiled testimony made any complaint about which customers were paying the Noticed Surcharge. Tr. at 395:19-22; 396:17-24 (Stephen Blackhurst, May 25, 2011).

Lacking language from its Petition and prefiled testimony to support the Unplead Claims, the ED points to out-of-context snippets of hearing testimony for support, but those lame efforts fail for at least two reasons. First, the ED's hindsight characterization of Mr. Lampman and Ms. Pascua's testimony is an inaccurate, post-hoc rationalization. In both testimony segments the ED cites, their testimony dealt with whether the language of the 2004 Notices was clear. There is no complaint regarding who the Noticed Surcharge was collected from. Second, under the Rules of Civil Procedure and case law, oral statements at trial alone are insufficient to amend the

² It was only after this question and answer that the ED's lawyer began asking questions of an Aqua Texas witness on this point.

pleadings in a case. *See* Tex. R. Civ. P. 66; *City of Fort Worth v. Zimlich*, 29 S.W.3d 63, 73 (Tex. 2000). Thus, the ED cannot get around the fact that the Petition failed to allege the Unplead Claims.

3. The ED never plead a claim alleging that Aqua Texas collected more than its notice authorized.

As explained in the ALJ's PFD, and as further discussed above, the ED only plead an allegation about the continuation of the \$0.85 surcharge. Now that the ED's plead claim has failed, the ED has raised an unplead claim that Aqua Texas collected more than its notice authorized. The ED's late allegation fails for a myriad of reasons. First, as exhaustively analyzed in both the PFD and above, the ED failed to plead this claim. *See* PFD at 10-16.

Second, the ED's claim that the ALJ concluded Aqua Texas collected speculative or un-incurred expenses is flat wrong. That is not what the ALJ concluded. The ALJ concluded that: (1) Aqua Texas' Notices did not contain a proposal to collect unincurred expenses; and (2) Aqua Texas never collected more than it incurred at any point in time during the 2004 Rate Case.

At any rate, this issue certainly does not provide notice of the ED's unplead claim that Aqua Texas failed to collect rate case expenses pursuant to the 2004 Notices.³

Third, by its plain meaning and as the ALJ concluded, this allegation looks to the 2004 Notices' language as the source of the violation. The ED's pleadings rely on the 2002 Order and the rate case expenses under it as its basis for a sanction, not the manner in which Aqua Texas followed the 2004 Notices' language. A quote from the first time the ED ever raised the argument — in its closing arguments — confirms this. The ED prefaced the argument with,

³ The ED claims that Aqua Texas never objected to litigation of the "speculative expenses" issue. Because there is no conceivable connection between that issue and the "incurred to date" issue, there was no reason to object to it.

“regardless of whether the Noticed Surcharge was authorized. . . .” So the issue was based on the assertion that, even if Aqua Texas *could* separately charge a surcharge based on its 2004 Notices, it was only allowed to collect rate case expenses incurred as of the date of the Notices. That is precisely what the ALJ correctly concluded the ED failed to plead.

Next, the ED argues that it was part of Aqua Texas’ defense that the 2004 Notices allowed it to collect future unknown rate case expenses, so Aqua Texas cannot now complain about lack of notice. The ED is wrong for two reasons. First, the ED misstated Aqua Texas’ defense. Aqua Texas said expenses were reasonably known and reasonably incurred, not that Aqua Texas could collect those expenses *if they weren’t*. Second, there is no logical connection between Aqua Texas’ rebutting the ED’s accusation that it collected unincurred expenses and being on notice that the ED seeks a violation merely because of the language in the 2004 Notices.

The ED argues that because Aqua Texas provided a collected amount for the Noticed Surcharge, Aqua Texas was “clearly on notice that the entire surcharge amount was at issue in this case.” This argument is similarly illogical — there is simply no connection between Aqua Texas providing a collected amount and notice of a claim pertaining to notice of the “incurred to date” issue. Aqua Texas provided evidence on the amount it collected using the Noticed Surcharge because the ED sought a refund — of a grossly overstated *billed* amount — of the surcharge as a corrective action in this case. Therefore, because the *collected* amount was in issue, Aqua Texas provided evidence on what was collected. By no stretch of the imagination does that mean Aqua Texas knew the ED was pursuing a violation because of the language in the 2004 Notices. There is simply no logical connection between the two.

4. The ED's argument that there is no harm to proceeding with its Unplead Claims lacks merit.

Alternatively, the ED argues that Aqua Texas was not unfairly surprised by the Unplead Claims, and therefore the ED should be allowed to pursue the Unplead Claims. In support, the ED says the ALJ allowed Aqua Texas to supplement its direct case to address the issue approximately 2-3 weeks later.

This argument lacks merit. The ALJ correctly noted that Aqua Texas did not have fair notice as required, and, even while it was allowed to introduce witness testimony, it was never able to offer other evidence that Aqua Texas may have chosen to present regarding the Unplead Claims. Moreover, because discovery had long since closed in the case, Aqua Texas was not able to conduct discovery on the ED's Unplead Claims.

Similarly, the ED's argument that Aqua Texas had time to prepare a defense because the ALJ allowed Aqua Texas to supplement its case 2-3 weeks later is meritless. First, the ALJ did not continue the hearing to allow Aqua Texas to supplement its case. Second, Aqua Texas was only permitted to provide witness testimony solely on the issue of which customers were charged the Noticed Surcharge.⁴ Third, the ALJ allowed Aqua Texas to introduce witness testimony responding to the issues that were raised for the first time at trial in order to "more fully complete the record." As the ALJ stated, that did not mean Aqua Texas had notice — he reserved analysis of that issue (pursuant to Aqua Texas' repeated objections) for the PFD.⁵ Further, just because Aqua Texas was able to introduce witness testimony does not mean it was able to prepare a defense. Because the ED failed to raise the issue, Aqua Texas was never able to address the

⁴ Tr. at 384: 5-19 (May 25, 2011).

⁵ PFD at 14.

issue in response to an NOV, in discovery, in prefiled testimony or do anything else beyond last-minute witness testimony the last day of the hearing.

Finally, as set out above, the ED's own witnesses' testimony proves the ED never raised the Unplead Claims. How could Aqua Texas prepare a defense when the ED's own witnesses said the Unplead Claims were *not* the claims against Aqua Texas? The answer is, it could not. As the ALJ in this case pointed out, "[i]t would be patently unfair to allow the ED's witnesses to take one position on the alleged violations while the ED's attorneys take another, all at the harm of Aqua Texas." PFD at 14.

B. The ED's other arguments attempting to establish a violation lack merit.

Notably, the ED does not dispute the ALJ's findings with regard to the lack of authority prohibiting the Noticed Surcharge itself. But the ED does attempt to cherry pick analysis from certain issues in the PFD and then misapply them to other issues to try to establish a violation. This is just another example of the ED's shifting and inconsistent theories that it has "thrown against the wall to see if they stick."

1. The ED's argument regarding unincurred expenses is meritless.

The ED argues that because the ALJ found that noticed rates cannot cover speculative future expenses, and because Aqua Texas acknowledges it charged customers a surcharge pursuant to the 2004 Notices to recover for expenses un-incurred and unknown at the time of the 2004 Notices, that the Noticed Surcharge was unauthorized, and therefore a violation occurred. Essentially, the ED is arguing that because Aqua Texas proposed in the 2004 Notices' language to collect rate case expenses unknown and unincurred at the time, the Noticed Surcharge was unauthorized at least in part, and therefore a violation occurred in this case.

This argument lacks merit for at least four reasons. First, the ALJ correctly found that the ED failed to plead allegations stemming from whether Aqua Texas properly followed the 2004 Notices' language. It bears repeating that Aqua Texas cannot be found liable for a violation that the ED did not plead.

Second, the ED's reliance on the ALJ's analysis is misplaced. The ALJ's analysis discussed the issue as a limitation on what Aqua Texas could collect pursuant to the 2004 Notices, not a statement of violation of the 2002 Order.

Third, AT never proposed to collect unknown or unincurred expenses, nor did it. The 2004 Notices were only intended to recover known and incurred expenses. Mr. Blackhurst, the person that drafted the Notices, testified to that effect at the hearing. Aqua Texas had known/incurred expenses at the time of the notices,⁶ and Mr. Blackhurst testified that Aqua Texas' hope was that the 2004 Rate Case would not be contested. Tr. at 410:16-19. And in hopes of avoiding a contested case, Aqua Texas proposed a phased-rate structure that would delay collections of the Noticed Surcharge. Tr. at 410:12-413:6. As a result, collections under the Noticed Surcharge were similarly phased-in, and did not begin until approximately three years after the 2004 Notices were filed. *Id.* Based on the language in the Notices and the undisputed fact that Aqua Texas never collected more rate case expenses than it had incurred, it is clear that Aqua Texas never proposed to collect unknown or unincurred expenses.

Finally, before the ED's argument could have any merit at all, the ED would have had to *prove* Aqua Texas actually collected rate case expenses that it had not incurred. The ED cannot

⁶ The ALJ agreed that AT properly collected surcharges pursuant to the Noticed Surcharge at least incurred at the time of filing.

do so because, as the ALJ correctly noted, it is undisputed that Aqua Texas did not collect more expenses than it had incurred.

2. The ED's argument that because Aqua Texas did not prove the Noticed Surcharge in the 2004 Rate Case, there is a violation in this enforcement case, lacks merit.

The ED argues that because the ALJ concluded that Aqua Texas never proved up the noticed surcharge in the 2004 Rate Case, there is a violation in this case. The ED further argues that Aqua Texas “cannot claim a proposed surcharge was authorized during the proceeding on the proposed surcharge when Aqua Texas did not include any information in its application supporting the proposed surcharge and did not offer any evidence or get any authorization of it during the proceeding on the proposed rate. As a result, the ED argues, the Noticed Surcharge was never authorized.

This argument lacks merit. First, it is factually wrong — the Noticed Surcharge was set out in 10 different places within the Application and the ED was required to review and approve the Notice. Second, the ED — not Aqua Texas — has the burden of proof *in this case*. The 2004 Rate Case has been over since the Commission issued the 2008 Order and the Order was affirmed on appeal. Aqua Texas met its burden of proof in the 2004 Rate Case and that case cannot be relitigated here. Aqua Texas proved its expenses in that case, including \$2,751,170.50 in rate case expenses approved by the Commission — an amount far more than Aqua Texas ever collected during the interim rate period. In contrast, this is an enforcement case, and the ED has the burden of proof. 30 TEX. ADMIN. CODE 80.17(d). And the ED cannot legitimately expect to meet that burden by re-opening the 2004 Rate Case, cherry-pick the *timing* in which Aqua Texas proved its rate case expenses, and claim that Aqua Texas did not meet its

burden to prove the Noticed Surcharge, at *that* time, and then claim that accordingly, the ED has proven the occurrence of a violation in *this* case.

The third and more fundamental reason the ED's argument fails is that the 2004 Rate Case is *res judicata*. It is not just that the ED is improperly trying to shift its burden to Aqua Texas — the issue of rate case expenses from the 2004 Rate Application has already been litigated and is now final and unappealable.

C. The ED's claim that Aqua Texas unilaterally created a bad debt expense for the Noticed Surcharge is meritless.

The ED claims that "Aqua Texas attempts, through this enforcement action, to set a precedent demonstrating that it can unilaterally determine and charge rate components." Specifically, the ED claims that Aqua Texas' consideration of bad debt amounts to changing its rates, and it cannot do so without following the rate process. The ED claims that Aqua Texas should refund what Aqua Texas *billed* for the Noticed Surcharge, not what it *collected*. In support, the ED points to the Mauriceville MUD appeal case, claiming that the Commission in that case made no allowance for bad debt expense.

These arguments lack merit for a number of reasons. First, the ALJ considered this issue and rejected the ED's argument because, under the plain language of the Commission's 2002 Order, the relevant inquiry is what Aqua Texas collected using the Noticed Surcharge, not what it billed. Second, the ED's argument is a farcical exaggeration of the real issue here. The issue in this case is what was collected, not billed. The 2002 Order said Aqua Texas could charge the surcharge "until the total recoverable amount is collected." AT-2 at 9 (2002 Order). The ED sought a refund of the billed amount of the Noticed Surcharge. As part of defending itself in this case, Aqua Texas was entitled to — and did — provide an accurate accounting of what was

actually collected using the Noticed Surcharge. As part of that accounting, Aqua Texas used what really is common sense and accounted for amounts it did not collect that were attributable to bad debt.

The ED's complaint that Aqua Texas "began changing its position to claim that it should be able to unilaterally determine and charge a bad debt expense component as part of the surcharge" is meritless. First, Aqua Texas did not make that claim; it simply provided evidence of the relevant amount in issue — the collected amount. Aqua Texas proved what the collected amount was, and provided ample evidence in support of that calculation. In contrast, the ED offered no evidence showing that Aqua Texas collected more than the total authorized amount in the 2002 Order, and therefore failed to meet its burden of proof.

Regarding *Mauriceville MUD*, the Commission's analysis in *Mauriceville MUD* does not support the ED's conclusion that the billed amount is the relevant issue in this case. The Commission in *Mauriceville MUD* considered the issue of how to allow Mauriceville MUD to recover a total of \$17,394.17 in rate case expenses. *Id.* Due to the small amount, Mauriceville MUD ultimately recommended a one-time surcharge of \$3.08 per water and sewer connection, designed to fully recover the full \$17,394.17 in rate case expenses. *Id.* In response, the ED indicated that the typical practice was to spread a surcharge out over a period time to reduce the impact to the customers, but since the amount in this case was small, the ED deferred to the Commission's discretion in deciding which way to handle it. *Id.* Notably, the ED agreed with Mauriceville MUD's one-time \$3.08 surcharge recommendation, despite the fact that collecting \$3.08 from 100% of its customers would result in a collection of just under \$1.00 *over* the total recommended authorization of \$17,394.17. *Id.* Ultimately, the Commission ordered:

The MMUD's request to apply a surcharge to recover rate case expenses in the amount of \$17,394.17, to be recovered as a one-time surcharge of \$3.08 per customer to each water and sewer customer, is approved. ***The surcharge shall be discontinued at such time as the amount of \$17,394.17 is recovered.***

Mauriceville Final Order at 5; SOAH Docket No. 582-10-2368; TCEQ Docket No. 2009-2022-UCR. The Commissioners' analysis during Agenda speaks for itself, but the Commissioners appeared to be concerned about efficiently allowing Mauriceville MUD to fully recover its total rate case expenses — not finding an amount that would prevent an overcollection at the expense of Mauriceville MUD's ability to fully recover its rate case expenses. That conclusion is supported by the fact that the Commission added the following sentence to its final order: "The surcharge shall be discontinued at such time as the amount of \$17,394.17 is recovered." See Mauriceville Final Order at 5; SOAH Docket No. 582-10-2368; TCEQ Docket No. 2009-2022-UCR. That conclusion is especially supported by the ED's recommendation that \$3.08 would be acceptable even though it would result in a small over-collection if 100% of Mauriceville MUD's customers paid the \$3.08 surcharge. Inherent in that recommendation must be an acknowledgment on the ED's part that a utility is not likely to collect 100% of what it bills.

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 in Aqua Texas' Exceptions to the PFD. Aqua Texas further requests all other and further relief to which it may be entitled at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on January 23, 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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