SOAH DOCKET NO. 582-09-3549
TCEQ DOCKET NO. 2009-0372-UCR

APPLICATION FOR A WATER RATE/TARIFF CHANGE OF WIEDENFELD WATER WORKS, INC., CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 12052 IN KERR, KENDALL, AND MEDINA COUNTIES	§ § § § § § § §	**BEFORE THE STATE OFFICE** **OF** **ADMINISTRATIVE HEARINGS**

WIEDENFELD WATER WORKS, INC.'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

COMES NOW, Wiedenfeld Water Works, Inc. (WWW) and files its Exceptions to the Proposal for Decision (PFD) of Administrative Law Judge (ALJ) Lilo Pomerleau in the above referenced cause. While WWW takes exception to all elements of the PFD, its Exceptions will be limited to the few issues that control the proposed outcome of this docket.

1. AMENDING THE APPLICATION

WWW filed an application to change the rates in 12 of the 13 individual public water systems (PWS) that it owns in the Kerr County region of Central Texas. The application was prepared by WWW president/owner Charles Wiedenfeld. After the preliminary hearing, in discussions with the TCEQ Staff and his counsel, Mr. Wiedenfeld learned

that he had made errors in the application.[1] Having learned that the application was not correct, Mr. Wiedenfeld could no longer adopt it under oath at the hearing on the merits as being true. For this reason, he identified the errors in his prefiled testimony and submitted an amended cost of service schedule that he could swear to.[2] The individual adjustments to the original application were discussed one by one through Mr. Wiedenfeld's prefiled testimony. Even a casual comparison of the original cost of service schedules and their amended replacements show where numbers were changed and how they tied to the prefiled testimony. No allocations changed because this was not needed. WWW had designed its rates using an alternate rate design which fixed the gallonage charges and let the base rate float.

The ALJ rejected Mr. Wiedenfeld's amendments to this original application and determined that WWW's rate change request must be evaluated on the basis of the original filed application. The ALJ found that Mr. Wiedenfeld made "changes not corrections" to the original application. The ALJ does not explain how she reached this

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[1] WWW Exh. 2, pg 15, line 20 - pg 16, line 8; Q. Where did you get the figures on Table VI.A of Exhibit 1 and Schedule C listed in the third column and entitled "12 Month `test year' per books"?
A. This information was taken from the business records of the utility which are maintained under my control in the ordinary course of my duties.

Q. Is the information true and correct?
A. To the best of my knowledge the numbers were correctly taken from the information contained in WWW's books. From discussions with the TCEQ staff and Mr. Zeppa, I have come to believe that, in preparing the rate change application, I booked some expenses to the wrong account, included expenses not recoverable through rates under the utility basis of ratemaking and have omitted other revenues. These items need to be corrected and I will do so as I go through the cost of service schedule in my testimony. These errors were inadvertent. The information in Schedule C is as correct as I could make it

[2] WWW Exh. 2, pg 41, line 15 - 21; Q. You have acknowledged that some errors were made in your proposed cost of service and that various known and measurable adjustments were proven to be high or low. Do you have a revised cost of service showing these changes?
A. Yes. Appended to my testimony as Schedule "C" are restated costs of service and rate design pages from the rate change application. They contain the changes I have discussed. It is the most accurate information that I have. They are appropriate for use in setting rates in the docket.

conclusion or how a change differs from a correction when all of the sworn testimony states the modification was made to correct errors.

30 TAC §291.25(g) provides that an applicant may "modify" a rate change application for good cause. There is no rule definition of what constitutes "good cause." WWW submits that the TCEQ has always found good cause existed when an applicant found errors in the application that had to be corrected. Even the ALJ stated that finding and correcting errors is a common practice.

The issue is really whether WWW should have filed a separate motion for leave to amend the erroneous original application. There is no rule requiring this procedure. It is not customarily done in contested or uncontested rate change applications at the TCEQ. Traditionally, the issue is carried along with the case and if raised, is settled by the Commissioners who have the ultimate power of decision. Now we have an ALJ playing "gotcha" because the applicant did not ask her approval to amend an application to correct errors identified under oath. She justifies this decision by saying WWW did not provide supporting invoices which made the Staff's evaluation of the application difficult. Of course, the ALJ did not identify any requirement in TCEQ rules or the application form that ever required invoices to be attached to an application. The production and review of invoices is a matter preformed during discovery, not in the hearing record.

There is nothing in the TCEQ rules that justifies a ruling that WWW is barred from proceeding with its rate case with an amended application. There is a rule allowing

amendment. There is nothing in the TCEQ rules that justifies a ruling that WWW is required to proceed to trial with its original application. Under the applicable TCEQ and SOAH rules, WWW's testimony and exhibits may only be sanctioned and limited for abuse of discovery. No discovery abuse was alleged or found to have occurred in this case. It should also be remembered that WWW's amended cost of service evidence – Schedule C to Mr. Wiedenfeld's prefiled testimony, was admitted into evidence without objection. If it was improper under the TCEQ's rules, surely the Staff attorney, the Public Interest Counsel and/or the intervenors' attorney would have pointed this out and objected to its admission.

The ALJ has fundamentally deprived WWW of due process of law by arbitrarily and capriciously rejecting its amended application and declaring that the record only contains the original application. WWW submits that the docket should be remanded to the ALJ for evaluation of the trial record on the basis of the correct application.

2. Water Code §13.145 Consolidated Tariff

Water Code §13.145 prohibits the consolidation of multiple systems under a single tariff unless a showing is made that the systems in question are "substantially similar" and the rates promote conservation. What "substantially similar" means is not explained by the statute. The TCEQ provided a set of standards to be applied in the Aqua Texas rate case.[3] Of the tests set out in *Aqua Texas*, the ALJ found that WWW had met them all

[3] *Application by Aqua Utilities, Inc. D/B/A Aqua Texas, Inc. to Change its Water and Sewer Tariffs and Rates in Various Counties, and Appeal of Ratemaking Actions of Various Municipalities Denying Requested Changes to Water and Sewer Tariffs*

except substantially similar costs of service. WWW's Exceptions will be limited to this single issue.

The ALJ said in her PFD that "she could not recommend the adoption of system-wide rates without knowing whether one system would be subsidizing another." Absolute prohibition of intra-system subsidization is a standard of the ALJ's own creation that is not supported by statute. Water Code §13.189 prohibits an "unreasonable" preference or advantage in rates. Water Code §13.145 only requires the systems' costs of services to be "substantially" the same, not absolutely the same. These two statutory standards are consistent with the Commission's findings in *Aqua Texas*.

The ALJ rejected the Aqua Texas case as the standard to be followed in the instant docket because of the relative differences in the size of Aqua Texas and WWW. However, both rate cases are to be decided under that same statute. That statute makes no distinction between utilities because of their size. The imposition of size-based applications of statutory criteria when this distinction is not supported in the organic law is an arbitrary and capricious act of regulatory fiat.

The ALJ attempts to get around this by agreeing with the Public Interest Counsel that WWW's case should be decided on the basis of the *Double Diamond* case.[4] What the ALJ overlooks is that the TCEQ rejected Double Diamond's rate change application not

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and Rates; SOAH Dockets Nos. 582-05-2770, 582-05-2771, 582-05-3745, 582-05-4181, 582-05-4182, 582-05-4184; TCEQ Docket Nos. 2004-1120-UCR, 2004-1671-UCR, 2004-2122-UCR, 2005-0113-UCR, 2005-0114-UCR, 2005-0112-UCR

[4] *Application of Double Diamond Utilities, Inc. to Change Rates*, SOAH Docket No. 582-08-069, TCEQ Docket No. 2007-1708-UCR

just on §13.145 issues but because the Commission found that Double Diamond failed to meet its burden of proof on every cost of service issue in the entire rate case.

The ALJ also rejected the application of the Aqua Texas findings to WWW claiming that the *Texas Landing Utilities*[5] case is more appropriate because of utility size. Other than to present by reference its arguments against application of statutory ratemaking criteria differently because of utility size, WWW would note that Texas Landing Utilities was remanded for further hearings. There is no final order in that case so it can have no precedential value.

It is also not fair to compare Double Diamonds' three systems scattered across the state and operated independently of each other with WWW's 13 systems all located in the same general area around Kerr County. The ALJ has failed to correctly identify the record evidence presented by WWW on the costs it incurs in operating these consolidated water systems. For example, WWW presented uncontroverted testimony that all systems were operated by the same two operators operating from a single, centralized business office[6]. WWW presented uncontroverted evidence that the utility has a single capital structure[7]. There is a single accounting system maintained by a single bookkeeper under Mr. Wiedenfeld's direction.[8] Mr. Wiedenfeld buys materials and supplies in bulk from local suppliers he knows well.[9] Utility expenses are incurred

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[5] *Application of Texas Land Utilities to Change Rates*, SOAH Docket No. 582-08-1023, TCEQ Docket No. 2007-1867-UCR
[6] WWW Exh. 2, pg 5, line 12 – pg 6, line 4
[7] WWW Exh. 2, pg 11, line 15 – pg 12, line 14
[8] 30 TAC §291.72 requires a small water utility to maintain its books under the NARUC Uniform System of Accounts. Neither NARUC nor any TCEQ rules require separate accounting systems for each individual water system.
[9] WWW Exh. 2, pg 17, line 5-9

locally and are necessary to provide both physical water service and customer service[10]. As the ALJ found, the systems are substantially similar physically and in water supply so it is reasonable to conclude the costs of chemicals and utilities to be "substantially" the same per unit. The remaining customary and routine expenses that WWW incurs are for the utility as a whole rather than system specific, i.e., taxes, insurance, vehicle expense, training, etc.

This evidence was functionally the same as the evidence presented by Aqua Texas. In that case, the Commission found it was appropriate to find "substantial similarity" in costs of service through per capita allocations. Allocating costs by number of connections is not rocket science but has been a long standing practice of the TCEQ and its predecessor agencies since 1976. It is no surprise that Staff Accountant Leila Guerrero-Gantioqui did not find individual system cost of service allocations in WWW's general ledger or on invoice copies. This is not where allocations are made under the accounting rules WWW must follow.

If WWW failed on the issue of substantial similarity of the costs of service of the various water systems, it was not the failure to present a preponderance of evidence. WWW presented all of the evidence. No other party presented any evidence on this issue, merely arguments why they did not agree with WWW's numbers. WWW's failure, if any, was in not making it clear how the record evidence fits the applicable statutes and case precedents. This would be an appropriate reason to remand this case for additional briefing.

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[10] WWW Exh. 2, pg 21, line 18 – pg 22, line 7

3. PRAYER

WHEREFORE PREMISES CONSIDERED, WWW prays that the ALJ's PFD be rejected as unsupported by the applicable law and relevant evidence. The case should be remanded with instructions that the record be reviewed on the basis of the amended application and the complete body of evidence on costs of service and allocations.

Respectfully submitted,

By:_____

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ATTORNEYS FOR WIEDENFELD WATER WORKS, INC.

CERTIFICATE OF SERVICE

I, Mark H. Zeppa, certify that the foregoing Exceptions were efiled with the TCEQ Chief Clerk, faxed to the Presiding Administrative Law Judge and emailed to all attorneys of record on October 21, 2010.

Mark H. Zeppa

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