

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

July 28, 2009

2009 JUL 28 PM 12:10  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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

Re: SOAH Docket No. 582-09-3642; TCEQ Docket No. 2009-0504-UCR; In Re: Application of Buena Vista Water System to Change Rates and Tariff, Certificate of Convenience and Necessity No. 11656, in Burnet County

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than August 17, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than August 27, 2009.

This matter has been designated **TCEQ Docket No. 2009-0504-UCR; SOAH Docket No. 582-09-3642**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "William G. Newchurch".

William G. Newchurch  
Administrative Law Judge

WGN:nl  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** BUENA VISTA WATER SYSTEM

**SOAH DOCKET NUMBER:** 582-09-3642

**REFERRING AGENCY CASE:** 2009-0504-UCR

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ WILLIAM G. NEWCHURCH**

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**REPRESENTATIVE / ADDRESS**

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BUENA VISTA WATER SYSTEM

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-3642  
TCEQ DOCKET NO. 2009-0504-UCR

2009 JUL 28 PM 12:10  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

APPLICATION OF BUENA VISTA §  
WATER SYSTEM TO CHANGE §  
RATES AND TARIFF, CERTIFICATE §  
OF CONVENIENCE AND NECESSITY §  
NO. 11656, IN BURNET COUNTY §  
§

BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**I. PROPOSAL FOR DECISION**

Buena Vista Water System (Buena Vista) seeks authorization to impose a \$56.50 per month surcharge on each of its water utility customers to repay a loan from the Texas Water Development Board (Board) to fund certain capital improvements to its system. It seeks no other change in its rates. However, the Board has not made such a loan to Buena Vista and Buena Vista has no application pending for such a loan.

Both the Executive Director (ED) and the Buena Vista Property Owners Association (Association) have filed motions for summary disposition denying Buena Vista's application. They mainly argue that imposing a surcharge on customers to repay a loan that does not and may never exist, because it has not even been applied for, would be unjust and unreasonable. The Association also argues that Buena Vista's application does not meet other requirements for approval. Buena Vista did not respond to the motions for summary disposition by the deadline to which it had agreed and the Administrative Law Judge (ALJ) had set in an order.

The ALJ proposes that the Commission grant the motions for summary disposition in part and deny Buena Vista's application because the proposed surcharge is unjust and unreasonable.

**II. JURISDICTION**

No party disputes the jurisdiction of either the Commission or the State Office of Administrative Hearings (SOAH). The attached Proposed Order contains the necessary findings and conclusions concerning jurisdiction.

### III. PROCEDURAL HISTORY

Buena Vista filed its application on March 9, 2009.<sup>1</sup> It mailed notice of its application to its customers on February 28, 2009.<sup>2</sup> More than 10 percent of Buena Vista's customers timely asked for a hearing on the application, and on April 15, 2009, the Commission's Chief Clerk referred the application to SOAH for hearing. Notice of the hearing was mailed by the Chief Clerk to Buena Vista, the ED, and the Office of Public Interest Counsel (OPIC) on April 17, 2009, and on April 23, 2009, Buena Vista mailed notice of hearing to its customers.<sup>3</sup>

On May 11, 2009, a preliminary hearing was held as indicated in the notices, and jurisdiction was proven. The following appeared and were admitted as parties:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Buena Vista	Nancy Donnelly
ED	Ron M. Olson
OPIC	Eli Martinez
Association	Roger Borgelt

At the preliminary hearing, the ED asked the ALJ to set an interim rate of zero dollars for the surcharge that Buena Vista seeks in this case. The ED argued that to require Buena Vista's ratepayers to pay a surcharge for a debt that Buena Vista did not have would have imposed an unreasonable economic hardship on them. He also argued that Buena Vista would not be harmed by interim rates excluding the surcharge since it had no obligation to make payments on a loan that did not exist. The ALJ agreed with the ED's arguments and granted the ED's motion to set an interim rate of zero dollars concerning the requested surcharge.

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<sup>1</sup> ED Ex. 4, Bates p. 000015, which was attached to the ED's motion for summary disposition. ED Exs. 1 through 7 were attached to and offered to support the ED's motion and not objected to by Buena Vista. They are admitted for the purpose of ruling on the motions.

<sup>2</sup> ED Ex. A.

<sup>3</sup> ED Exs. B and C.

The ED also indicated at the preliminary hearing that he intended to file a motion for summary disposition denying Buena Vista's application. The Association indicated that it, too, might file a motion for summary disposition. The ALJ determined that it would be more efficient to resolve the summary disposition motions before setting a schedule for the remainder of the case. No party objected to proceeding in that fashion.

As agreed upon by the parties, any motion for summary disposition was due by May 22, 2009, and any response to a motion for summary disposition was due by June 22, 2009. On May 21, 2009, the ED and on May 22, 2009, the Association filed motions for summary disposition. Buena Vista never filed a response to either motion.

#### IV. APPLICABLE LAW

Commission rule 80 TEX. ADMIN. CODE (TAC) § 80.137(c) provides:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

As set out below, the material facts are not in genuine dispute.

A surcharge is an authorized rate to collect revenues over and above the usual cost of service. 30 TAC § 291.21(k)(1). A utility must use the revenues collected pursuant to a surcharge only for the purposes noted in the application submitted by the utility to the Commission, unless otherwise directed by the ED. 30 TAC § 291.21(k)(3).

Commission rule 30 TAC § 291.32(d) also addresses surcharges and states:

(1) Capital improvements. In a rate proceeding, the commission may authorize collection of additional revenues from the customers to provide funds for capital improvements necessary to provide facilities capable of providing adequate and continuous utility service, and for the preparation of design and planning documents.

(2) Debt repayments. In a rate proceeding, the commission may authorize collection of additional revenues from customers to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development Board in regard to financial assistance from the Safe Drinking Water Revolving Fund.

As set out in TEX. WATER CODE ANN. § 13.184(c):

In any proceeding involving any proposed change of rates, the burden of proof shall be on the utility to show that the proposed change, if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable.

## **V. THE CLAIMED PURPOSE OF THE SURCHARGE IS TO REPAY A LOAN**

The application could be a bit clearer as to the purpose for the surcharge. Is it to directly pay for capital improvements or to repay a loan to fund capital improvements? In the notice of the proposed rate change that Buena Vista prepared and included in its application, Buena Vista stated that its surcharge request was for:

Proposed construction cost of water treatment plant improvements, elevated storage and ground storage tank, distribution and transmission lines, pump station. To correct TCEQ enforcement violations. \$1,070,000.00 at 5% for 240 months. Each of the 125 customers' monthly surcharge amount is \$56.50.<sup>4</sup> [*sic*]

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<sup>4</sup> ED Ex. 4, Bates p. 000018.

The mentioned interest rate certainly implies that the surcharge would be used to repay a loan, otherwise customers would be paying the full cost of the improvements plus an extra five percent of pure profit to the utility. Additionally, in response to a question on the application form asking how and when it would correct existing deficiencies, Buena Vista referred to a loan application to the Board and stated it was the “[p]urpose of this surcharge.”<sup>5</sup>

A letter of November 14, 2008, was also attached to the application, which apparently had supported a previous surcharge application that Buena Vista has now resubmitted. In the letter, Buena Vista requested approval of a surcharge:

... for the proposed construction costs of the water treatment plant improvements, elevated storage and ground storage tank, distribution and transmission lines, pump station, etc. to correct the TCEQ enforcement violations associated with the treatment and distribution systems. ... Buena Vista Water System is requesting financial assistance from the Texas Water Development Board to upgrade the treatment, storage, and distribution system to bring it into full compliance with state regulations. ...<sup>6</sup>

Taken as a whole, the above indicates that Buena Vista is seeking the surcharge to repay a loan from the Board. Moreover, any confusion was cleared at the preliminary hearing when Buena Vista’s representative, Nancy Donnelly, explained that Buena Vista was seeking approval of the surcharge to give it a stream of revenue to repay a loan from the Board that Buena Vista will use to pay for capital improvements.

## **VI. THERE IS NO LOAN OR APPLICATION FOR A LOAN**

When separately contacted by the Commission Staff and Mike Wortham, who is a member of the Association, the Board Staff reported in writing that Buena Vista has no existing loans, grants, or pending applications with the Board. The Board staff noted that Buena Vista

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<sup>5</sup> ED Ex. 4, Bates p. 000016.

<sup>6</sup> ED Ex. 4, Bates pp. 000019-000020.

was invited to apply for a loan in 2008 and 2009. It applied in 2008, but never finalized its application. It did not apply at all in 2009.<sup>7</sup>

At the preliminary hearing, Ms. Donnelly agreed that Buena Vista has no current loan or even an application for a loan from the Board.

#### **VII. A RESERVE IS NOT REQUIRED TO APPLY FOR A BOARD LOAN**

At the preliminary hearing, Ms. Donnelly attempted to justify seeking a surcharge to repay a non-existing and non-applied for loan. She stated that Buena Vista did not want to incur the expense of applying for the loan until it knew in advance that the surcharge would be approved to repay the loan. She added that the Board requires a utility to accumulate a reserve through its rates that would allow it to make 12 monthly loan payments before the Board will even consider a loan application. That is incorrect.

Joe P. Reynolds, a Board attorney, stated in a May 20, 2009 letter to the ED's counsel that no such pre-application cash reserve was required to apply for a loan. He did note that over the initial 60 months following the issuance of a loan a borrower was required to accumulate a reserve fund of no less than the average annual debt service requirements in equal monthly installments.<sup>8</sup>

#### **VIII. THE PROPOSED SURCHARGE IS UNJUST AND UNREASONABLE AND SHOULD BE DENIED**

In their motions, the ED and the Association argue that the proposed surcharge is unjust and unreasonable because Buena Vista cannot use the surcharge proceeds for the purpose stated in the application: it cannot repay a loan from the Board because that loan does not and may never exist. The Association also argues that Buena Vista has failed to meet the minimum legal

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<sup>7</sup> ED Exs. 6 and 7.

<sup>8</sup> ED Ex. 7.

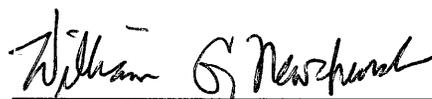
requirement for a surcharge set out in 30 TAC § 291.32(d)(2), which authorizes surcharges for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds.

The ALJ generally agrees with the ED and with the Association. However, he sees no need to reach a legal conclusion concerning the Association's second point, since it suggests, without thorough legal argument, that the Commission does not have the authority to approve a surcharge for reasons or purposes other than those set out in 30 TAC § 291.32(d)(2). The ALJ recommends that the Commission adopt the narrowest possible basis for a denial to avoid setting too broad a precedent. Along those lines, the Commission should take into account the fact that no reserve is needed to apply for a Board loan.

The ALJ recommends that the Commission adopt the attached Proposed Order and:

- find that that the proposed surcharge is unjust and unreasonable because the claimed purpose is to repay a Board loan that does not exist, has not been applied for, and would not require a repayment reserve if applied for;
- grant the motions for summary disposition in part; and
- deny the application.

SIGNED July 28, 2009.



WILLIAM G. NEWCHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

2009 JUL 28 PM 12:11

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
DENYING THE APPLICATION OF BUENA VISTA WATER SYSTEM TO CHANGE  
RATES AND TARIFF, CERTIFICATE OF CONVENIENCE AND NECESSITY NO.  
11656, BURNET COUNTY, TEXAS  
SOAH DOCKET NO. 582-09-3642  
TCEQ DOCKET NO. 2009-0504-UCR**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Buena Vista Water System (Buena Vista) to change its rates and tariff under Certificate of Convenience and Necessity No. 11656, in Burnet County, Texas. A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing in this case on May 11, 2009, in Austin, Texas, and, after giving Buena Vista an opportunity to reply, recommended that the Commission grant, in part, motions for summary disposition denying the Application.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

### *Procedural History*

1. Buena Vista provides retail water utility service under Certificate of Convenience and Necessity No. 11656, in Burnet County, Texas.
2. On March 9, 2009, Buena Vista filed an application to change its rates and tariff. Buena Vista seeks authorization to impose a \$56.50 per month surcharge on each of its water utility customers to repay a loan from the Texas Water Development Board (Board) to fund certain capital improvements to its system. It seeks no other change in its rates.

3. Buena Vista mailed notice of its application to each of its ratepayers on February 28, 2009.
4. More than 10 percent of Buena Vista's ratepayers timely asked for a hearing on the application.
5. On April 15, 2009, the Commission's Chief Clerk referred the application to SOAH for hearing.
6. Notice of the hearing was mailed by the Chief Clerk to Buena Vista, the Executive Director (ED), and the Office of Public Interest Counsel (OPIC) on April 17, 2009.
7. On April 23, 2009, Buena Vista mailed notice of the hearing to each of its ratepayers.
8. The notices of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
9. On May 11, 2009, the ALJ held a preliminary hearing as indicated in the notices, and jurisdiction was proven. The following appeared and were admitted as parties:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Buena Vista	Nancy Donnelly
ED	Ron M. Olson
OPIC	Eli Martinez
Buena Vista Property Owners Association (Association)	Roger Borgelt

10. At the preliminary hearing, the ED asked the ALJ to set an interim rate of zero dollars for the surcharge that Buena Vista seeks in this case.
11. The ALJ agreed with the ED's arguments and granted the ED's motion to set an interim rate of zero dollars concerning the requested surcharge.
12. The ED also indicated at the preliminary hearing that he intended to file a motion for summary disposition denying Buena Vista's application. The Association indicated that it, too, might file a motion for summary disposition.
13. As agreed upon by the parties and ordered by the ALJ, any motion for summary disposition was due by May 22, 2009, and any response to a motion for summary disposition was due by June 22, 2009.
14. On May 21, 2009, the ED and on May 22, 2009, the Association filed motions for summary disposition.
15. In their motions for summary disposition, the ED and the Association mainly argued that imposing a surcharge on customers to repay a loan that does not and may never exist because it had not even been applied for would be unjust and unreasonable. The Association also argued that Buena Vista's application did not meet other requirements for approval.
16. Buena Vista did not respond to the motions for summary disposition by the deadline to which it had agreed and the ALJ had ordered.

### *Purpose of the Surcharge*

17. In the notice of the proposed rate change that Buena Vista prepared and included in its application, Buena Vista stated that its surcharge request was for:

Proposed construction cost of water treatment plant improvements, elevated storage and ground storage tank, distribution and transmission lines, pump station. To correct TCEQ enforcement violations. \$1,070,000.00 at 5% for 240 months. Each of the 125 customers' monthly surcharge amount is \$56.50. [*sic*]

18. The mentioned interest rate indicates that the surcharge would be used to repay a loan.
19. In response to a question on the application form asking how and when it would correct existing deficiencies, Buena Vista referred to a loan application to the Texas Water Development Board (Board) and stated it was the “[p]urpose of this surcharge.”
20. A letter of November 14, 2008, was also attached to the application, which apparently had supported a previous surcharge application that Buena Vista has now resubmitted. In the letter, Buena Vista requested approval of a surcharge:

... for the proposed construction costs of the water treatment plant improvements, elevated storage and ground storage tank, distribution and transmission lines, pump station, etc. to correct the TCEQ enforcement violations associated with the treatment and distribution systems. ... Buena Vista Water System is requesting financial assistance from the Texas Water Development Board to upgrade the treatment, storage, and distribution system to bring it into full compliance with state regulations. ...

21. At the preliminary hearing Buena Vista's representative, Ms. Donnelly, explained that Buena Vista was seeking approval of the surcharge to give it a stream of revenue to repay a loan from the Board that Buena Vista will use to pay for capital improvements.

22. Based on the above Findings of Fact, Buena Vista is seeking the surcharge to repay a loan from the Board.

***There Is No Loan or Application for a Loan***

23. Buena Vista has no existing loans, grants, or pending applications with the Board. Buena Vista was invited to apply for a loan in 2008 and 2009. It applied in 2008, but never finalized its application. It did not apply at all in 2009.

***A Reserve Is Not Required To Apply For a Board Loan***

24. A retail water utility is not required to have a pre-application cash reserve to partially assure repayment of a loan from the Board before applying for such a loan.

**II. CONCLUSIONS OF LAW**

1. Buena Vista Water System is a retail public utility under TEXAS WATER CODE ANN. (Water Code) § 13.002(19) and a public utility under Water Code § 13.002(23).
2. The Commission has jurisdiction to consider an application for a rate increase filed by a retail public water utility, pursuant to Water Code § 13.042(e).
3. All required notices of the application and the preliminary hearing on it were given as required by law, including Water Code § 13.187 and TEX. GOV'T CODE ANN. (Government Code) §§ 2001.051 and 2001.052.
4. The ALJ conducted a preliminary hearing and proposed a decision on the application under the authority of chapter 2003 of the Government Code and chapter 13 of the Water Code.

5. Commission rule 80 TAC § 80.137(c) provides:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

6. The material facts set out in the above Findings of Fact are not in genuine dispute.
7. A surcharge is an authorized rate to collect revenues over and above the usual cost of service. 30 TEX. ADMIN. CODE (TAC) § 291.21(k)(1).
8. A utility must use the revenues collected pursuant to a surcharge only for the purposes noted in the application submitted by the utility to the commission, unless otherwise directed by the ED. 30 TAC § 291.21(k)(3).
9. In any proceeding involving any proposed change of rates, the burden of proof shall be on the utility to show that the proposed change, if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. Water Code § 13.184(c).
10. Based on the above Findings of Fact and Conclusions of Law, the proposed surcharge is unjust and unreasonable because the claimed purpose is to repay a Board loan that does not exist, has not been applied for, and would not require a repayment reserve if applied for.
11. Based on the above Findings of Fact and Conclusions of Law, the motions for summary disposition should be granted in part.

12. Based on the above Findings of Fact and Conclusions of Law, Buena Vista's application should be denied.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT:**

1. The application of Buena Vista Water System to change its rates and tariff under Certificate of Convenience and Necessity No. 11656, in Burnet County, Texas, is denied.
2. The Chief Clerk of the Commission shall forward a copy of this Order to each party.
3. All other motions, requests for specific Findings of Fact or Conclusions of Law, and other requests for general and specific relief, if not expressly granted, are denied for want of merit.
4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Buddy Garcia, Chairman  
For the Commission**