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SOAH DOCKET NO. 473-14-5144.WS
PUC DOCKET NO. 42866

PETITION OF TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 12 APPEALING CHANGE OF WHOLESALE WATER RATES IMPLEMENTED BY WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY; CITY OF BEE CAVE, TEXAS; HAYS COUNTY, TEXAS; AND WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 5	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY'S RESPONSE TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

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PUBLIC UTILITY AGENCY

October 22, 2015

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TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS COMMISSIONERS:

COMES NOW, the West Travis County Public Utility Agency ("WTCPUA") and files this Response to Exceptions ("Response") to the Proposal for Decision ("PFD") in the above-referenced matter. This Response is submitted under 16 Texas Administrative Code ("TAC") § 22.261(d), the October 1, 2015 letter from Stephen Journeay, in the Public Utility Commission's ("Commission") Advising & Docket Management Department, and other applicable laws, rules, and orders. This Response is timely filed.

I. INTRODUCTION

WTCPUA respectfully asks the Commission to adopt the Administrative Law Judge's ("ALJ") PFD, including the Findings of Fact and Conclusions of Law. WTCPUA fully supports the PFD, which recommends dismissal of the petition ("Petition") filed by Travis County Municipal Utility District No. 12 ("TCMUD 12") appealing the wholesale rates adopted by the Board of Directors of WTCPUA on November 21, 2013 (the "Protested Rates"). The Protested Rates are charged to TCMUD 12 under the Wholesale Water Services Agreement Between Lower Colorado River Authority ("LCRA") and TCMUD 12 (herein the "2009 Agreement")[1] as

[1] Direct Testimony of Donald G. Rauschuber, P.E., WTCPUA Ex. 1 at 67 (Attachment G).

amended by the Agreement Regarding Transfer of Operations of the West Travis County System from the LCRA to the WTCPUA (herein the "2012 Amendment")[2] for diverting, treating, and delivering TCMUD 12's raw water supply ("wholesale water treatment services"). The PFD is the product of the ALJ's thorough review of the entire record, and application of pertinent laws and regulations. WTCPUA files this Response to Exceptions in support of Commission Staff's Amended Exceptions, and WTCPUA is unopposed to the Exceptions of the City of Bee Cave. However, WTCPUA opposes the Exceptions filed by TCMUD 12 ("Exceptions"), and requests that the Commission reject the Exceptions in their entirety.

As discussed in more detail herein, TCMUD 12 failed to meet its burden of proof under what is known as the Public Interest Rule, 16 TAC § 24.133, because the Protested Rates do not evidence an abuse by WTCPUA of any alleged monopoly power in providing wholesale water treatment services. Even more fundamentally, TCMUD 12 failed to prove that the WTCPUA is a monopoly in its provision of wholesale treated water services to TCMUD 12. The evidence shows that when TCMUD 12 selected the LCRA in 2009 as its provider of wholesale treated water service, the LCRA became a sole-source provider of that service. The assignment of the LCRA's contract rights to the WTCPUA in 2012 meant that the WTCPUA also became a sole-source provider of the services to TCMUD 12. Expert testimony provided by the WTCPUA that applied economic principles to the contractual agreements governing the parties' relationship showed that the WTCPUA did not exhibit the characteristics of a monopoly. Indeed, the 2009 Agreement contained provisions that would *never* be found in a monopolistic situation.

TCMUD 12 has failed to prove that the WTCPUA had disparate bargaining power over TCMUD 12 at any time during the contractual relationship between these parties, because TCMUD 12 had alternative means for service, TCMUD 12 did not provide reliable information on the cost for receiving services from an alternative provider, and TCMUD 12 did not face problems in the event it obtained alternative wholesale water treatment services. Contrary to the

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[2] *Id.* at 103 (Attachment J).

Exceptions, the record contains overwhelming evidence that TCMUD 12 had choices prior to entering into the 2009 Agreement, as well as in 2013 when the WTCPUA Board adopted the Protested Rates. TCMUD 12 failed to offer credible evidence regarding the costs to obtain such alternative services. Instead, WTCPUA provided detailed cost information, sealed by its engineer,[3] refuting TCMUD 12's evidence and demonstrating that TCMUD 12's last-minute cost estimate was unreliable. TCMUD 12 makes numerous references in its Exceptions to WTCPUA's offer to provide its wholesale customers, including TCMUD 12, with an opportunity to modify their maximum reserved capacities. This offer does not demonstrate disparate bargaining power. To the contrary, the evidence shows that this offer, which TCMUD 12 rejected, is prima facie evidence that TCMUD 12 has equal, if not greater, bargaining power than WTCPUA, and that TCMUD 12 had the opportunity to obtain wholesale water treatment services for its 132 connections (the number of connections as of January 1, 2014) from an alternate provider.[4]

The record also is rich with evidence that the Protested Rates, as compared to the WTCPUA's previous wholesale water treatment service rates (adopted on November 15, 2012) ("Prior Rates"),[5] do not reflect a change in the computation of the revenue requirement or rate from one methodology to another. The record contains evidence that TCMUD 12, WTCPUA, and the Commission all agree that the Protested Rates and Prior Rates both used the cash basis revenue requirement methodology and both employed a rate structure containing a Monthly Charge and a uniform Volume Rate.[6] Because TCMUD 12 is unable to avoid these undeniable facts that are fatal to its Petition, TCMUD 12 instead focused on an analysis of WTCPUA's cost

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3 *Id.* at 245 (Attachment V).

4 Proposal for Decision at 15 (Sept. 30, 2015). (PFD).

5 WTCPUA Ex. 1 at 158 (Attachment M).

6 Direct Testimony of Jack Stowe, WTCPUA Ex. 3 at 11-13; Tr. at 399:19-23 (Graham Cross) (Apr. 22, 2015); Tr. at 199 (Apr. 21, 2015); WTCPUA Ex. 4 at RFA No. 1-7; Tr. at 168:21-25 (Joyce Cross) (Apr. 21, 2015); TCMUD 12's Initial Brief at 48 (June 26, 2015); WTCPUA Ex. 3 at 17; Direct Testimony of Heidi Graham, Staff Ex. 1 at 11.

of service, which is absolutely inadmissible in this matter under the Commission's rule (16 TAC § 24.133(b)).

The Public Interest Rule requires the Commission to forward the petition to review wholesale rates charged pursuant to a written contract to the State Office of Administrative Hearings ("SOAH") to conduct an evidentiary hearing on the public interest. Specifically, the Public Interest Rule provides that "[t]he commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service."[7]

As discussed in more detail herein, an analysis of the cost of service is the part of ratemaking process where the service provider determines how to *allocate* its revenue requirement to its customers/customer classes; TCMUD 12's case is wholly based upon how WTCPUA *allocated* its revenue requirement.

The record is clear that the Protested Rates are significantly lower than the Prior Rates, they are lower than the rates LCRA and TCMUD 12 initially agreed to when they entered into the 2009 Agreement, and they are, historically, the lowest that such rates have ever been.[8] The Monthly Charge was lowered by more than 25% from $10,891.65 to $8,140.89 and the Volume Rate was reduced by more than 23% from $2.77 per 1,000 gallons to $2.11 per 1,000 gallons.[9]

For these reasons, the record is clear that WTCPUA did not exercise any monopoly power, and that it did not abuse any alleged monopoly power in adopting the Protested Rates. The Commission should adopt the PFD.

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[7] 16 Tex. Admin. Code § 24.133(b) (TAC).

[8] *See* WTCPUA Ex. 1 at 32 (Table 1) (outlining the rates charged to TCMUD 12 since inception of the 2009 Agreement). This table is inserted herein in Section VIII.B., *infra*.

[9] *Id.*

II. PARTIES

TCMUD 12 claims that the PFD erred in failing to define the WTCPUA as a "retail public utility."[10] The PFD did not err. The WTCPUA addressed this issue in its Response Brief at pages 18-22, and will further address this issue in Section VIII.C., *infra*.[11]

III. PROCEDURAL HISTORY

WTCPUA supported and did not take exception to this Section of the PFD, and given that no other party has taken any exceptions to this Section, WTCPUA does not offer a response.

IV. BACKGROUND

WTCPUA supported and did not take exception to this Section of the PFD, and given that no other party has taken any exceptions to this Section, WTCPUA does not offer a response.

V. JURISDICTION

TCMUD 12 claims that the ALJ's analysis of jurisdiction contains an error of law because it does not accept that the WTCPUA is a "retail public utility" under Texas Water Code ("TWC") § 13.002(19).[12] This assertion by TCMUD 12 is in error, as addressed by the WTCPUA in its Response Brief at pages 18-22. The WTCPUA will further address this issue in Section VIII.C., *infra*.

VI. BURDEN OF PROOF

WTCPUA supported and did not take exception to this Section of the PFD, and given that no other party has taken any exceptions to this Section, WTCPUA does not offer a response.

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[10] TCMUD 12's Exceptions to the Proposal for Decision at 7-8 (Oct. 15, 2015). (TCMUD 12 Exceptions).

[11] The WTCPUA would note that the parties and the PFD have misspelled the name of one of WTCPUA's attorneys. The correct spelling is "Crump."

[12] TCMUD 12 Exceptions at 8.

VII. THE PUBLIC INTEREST DETERMINATION

A. Requirement for an Initial Public Interest Determination

The PFD's discussion of the need for an initial determination of whether the Protested Rates are adverse to the public interest is correct. TCMUD 12 has not alleged otherwise. TCMUD 12 does not argue that the rate it protested was not set pursuant to a written contract.

B. Determining Whether Public Interest is Adversely Affected

The PFD is correct when it notes that of all of the "public interest" criteria listed in the Commission's rule at 16 TAC § 24.133, the only two criteria alleged by TCMUD 12 to have been violated are found at § 24.133(a)(3)(A) (disparate bargaining power) and (C) (change of computation of revenue requirement or rate from one methodology to another).

In its Exceptions, TCMUD 12 makes much of the fact that the rules governing this public interest proceeding, and the precedent of contested cases under the rules, were established by a state agency other than the Commission. It appears that TCMUD 12 is urging the Commission to ignore the rationale for the Public Interest Rule and the administrative case law that has developed over the years under the application of that rule, and thereby overturn the PFD.[13]

In its attempt to persuade the Commission that it is now appropriate to ignore years of precedent, TCMUD 12 cites a case recently before the Commission.[14] The citation to the *North Austin MUD No. 1* appeal is inappropriate; nothing determined by the Commission in that case is applicable to the appeal brought by TCMUD 12 in this case. The appeal brought by North Austin MUD No. 1 was *not* brought under TWC § 13.043(f), nor were the Commission's public interest rules applied in that proceeding. Instead, the appeal in Docket No. 42857 was brought under TWC § 13.044, *Rates Charged by Municipality to District.* In that case, there was a disagreement initially amongst the litigants as to whether the Commission had to first find that the protested rates were adverse to the public interest before it could set rates. The Commission

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[13] *Id.* at 9.

[14] The case cited is *Petition of North Austin MUD No. 1, et al. Appealing the Ratemaking Actions of the City of Austin*, Docket No. 42857. *See*, TCMUD 12 Exceptions at 9, footnote 22.

ultimately determined in that case that the public interest inquiry was not required because the rates were established by ordinance, and not by contract, and the contracts between the parties were relevant solely to establish the applicability of TWC § 13.044.

TCMUD 12's purpose in directing the Commission's attention to Docket No. 42857 can only be assumed, but it certainly appears that TCMUD 12 would have the Commission look at the vehicle used by WTCPUA to establish rates (i.e., a board order), and conclude that the order is sufficiently similar to a municipal ordinance to support both a departure from precedent and a change in the standard of review employed in a public interest determination.[15] This argument, surfacing as it has only in TCMUD 12's Exceptions, should be seen as little more than a last ditch effort to obscure the fact that TCMUD 12 failed to carry its burden of proof in this case.[16]

TCMUD 12 also points to the fact that since the time that the Texas Natural Resource Conservation Commission ("TNRCC") initially adopted the bifurcated process for the consideration of appeals of wholesale contractual rates, there has been no finding by any agency that a seller's rate adversely affected the public interest, and thus erroneously leaps to the conclusion that there is "no precedent to follow."[17] However, TCMUD 12 could not be more wrong about this state of precedent. The precedent that has consistently been followed by the TNRCC and the Texas Commission on Environmental Quality ("TCEQ"), and that should be maintained by the Commission, is the precedent compelled by the Texas Constitution and reinforced by the appellate courts of the State of Texas.

The Texas Constitution, Article 1, § 16 provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

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[15] "Similarly, WTCPUA has not set the Protested Rates by contract, but instead set them by Order, ..." TCMUD 12 Exceptions at 9, footnote 22.

[16] TCMUD 12 has never before argued that a rate set by board action is not a rate set pursuant to a contract. In fact, on page 9 of its Exceptions, just above this newly-minted argument, TCMUD 12 states unambiguously that "the WTCPUA's authority to charge wholesale rates to TCMUD 12 arises under, or 'pursuant to,' [the Wholesale Water Services Agreement] and the Transfer Agreement." TCMUD 12 Exceptions at 9.

[17] TCMUD 12 Exceptions at 10, footnote 26.

This precedent *requires* that wholesale rates set pursuant to a contract are not to be lightly set aside.[18] The only manner in which contract rates can be set aside at all, is if the agency "first make[s] a finding that the rates affected by a 'decision of the provider' adversely affect the public interest by being unreasonably preferential, prejudicial, or discriminatory."[19] With this very clear instruction in mind, the state agencies charged with the protection of the public interest have placed the burden of proof on the party challenging the rates, have required that party to provide compelling evidence of unreasonable preference, prejudice, or discrimination, and have been guided in that determination by the rules now residing at 16 TAC § 24.128, *et seq.*

TCMUD 12 erroneously accuses the ALJ of going to extremes to interpret the Public Interest Rule.[20] Instead, it is TCMUD 12 that would have the Commission bend over backwards to weaken the protections afforded by its rules to contracts. In so doing, TCMUD 12 reads far more into the Commission's granting of TCMUD 12's appeal of SOAH Order No. 6 than is appropriate.[21]

The prelude to the referenced Commission Order was a request for production from TCMUD 12 to WTCPUA involving electronic spreadsheets and supporting documents for calculation of the protested rates. The ALJ sustained WTCPUA's relevancy objections, and TCMUD 12 appealed SOAH Order No. 6 to the Commission.[22] In its appeal, TCMUD 12 stated that "[t]he determination of whether supporting documents are discoverable – not whether the documents are admissible – is before the Commission in this Interim Appeal."[23] TCMUD 12 made no argument to the Commission that the public interest inquiry should be broadened

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18 *Texas Water Commission v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied).

19 *Id.*

20 TCMUD 12 Exceptions at 10.

21 *Id.* and footnote 23.

22 SOAH Order No. 6 (Sept. 30, 2014).

23 TCMUD 12's Interim Appeal of SOAH Order No. 6 at 2 (Oct. 10, 2014), PUC Interchange Docket No. 42866, Item #55.

beyond the scope of the inquiry undertaken in prior cases or undertaken in this case; rather, it argued only that documents "do not lose their relevancy to the public interest inquiry just because they may also be relevant to a cost of service inquiry."[24]

TCMUD 12's appeal of SOAH Order No. 6 was taken up by the Commission on November 24, 2014. The Commission heard no oral arguments and engaged in no discussion before voting to grant the appeal. Neither does the Order on Appeal give any indication of the Commission's thinking on the public interest inquiry, merely stating that it overturns the ALJ's decision in SOAH Order No. 6 and ordered the WTCPUA to produce the items sought by TCMUD 12.[25]

The PFD appropriately applied the existing rules and criteria to the facts in this case. The reality that TCMUD 12 simply failed to meet its burden of proof provides no justification for changing the interpretation of the rules that were established in accordance with the Constitution and the rulings of the courts of the State.

VIII. ALLEGED ABUSE OF MONOPOLY POWER

TCMUD 12 uses the opportunity in this portion of its Exceptions to restate the arguments made in its initial and responsive briefs, arguments that were all available to the ALJ and that were appropriately rejected by the ALJ. TCMUD 12 excepts to the PFD's limited discussion of the testimony presented by TCMUD 12 with regard to the existence of monopoly power. However, it must be noted that as the trier of fact, and thus the judge of the credibility of witnesses and evidence, the ALJ appropriately discounted testimony based on "manifestly unreliable" evidence, such as that offered by Dr. Zarnikau ("Zarnikau") for TCMUD 12.[26] Zarnikau's academic discussion of the characteristics of a monopoly was ultimately tainted by

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[24] *Id.* at 6.

[25] Order on Appeal of SOAH Order No. 6 (Nov. 24, 2014).

[26] PFD at 50.

his reliance on "two key premises not supported by the evidence," and rendered his opinion of little evidentiary value.[27]

The PFD appropriately notes that the Commission's rules do not specify what is meant by "monopoly power" in the Public Interest Rule.[28] TCMUD 12 does not allege in its Exceptions that any statutory or regulatory definition exists (nor did it offer any evidence to that effect), but merely argues that the analysis by its expert was superior to the analysis presented by the expert witness for the WTCPUA, Mr. Richard Baudino ("Baudino"). There is more than sufficient evidence in the record to support the PFD's finding that the WTCPUA is not a monopoly;[29] TCMUD 12 points to nothing new in the record that it did not also include in its initial and reply briefs.

The evidence was fully considered by the ALJ, and the multiple citations in the PFD to Zarnikau's Direct Testimony illustrate the ALJ's consideration of his position.[30] The ALJ's rejection of Zarnikau's definition of monopoly is supported by the testimony of WTCPUA witness Baudino, also an economic expert. Baudino's testimony fully rebutted that of TCMUD 12 witness Zarnikau, as noted in the PFD, to-wit: WTCPUA is not the only option for TCMUD 12's water treatment needs; the WTCPUA does not have complete control over prices and quantities of service; TCMUD 12 has, and has had, substantial bargaining power; and high costs of entry do not necessarily suggest a monopoly market.[31] As noted by WTCPUA in its Initial Brief, Zarnikau's failure to apply his theory of monopoly to the facts and to the contractual provisions governing the relationship between TCMUD 12 and the WTCPUA substantially diminishes the weight of his academically-based opinion.

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27 *Id.*

28 *Id.* at 47. The WTCPUA agrees with the PFD that the WTCPUA is not a monopoly for wholesale purposes merely because it also provides retail utility service. *See, infra,* at Section VIII.C.

29 Direct Testimony of Richard A. Baudino, WTCPUA Ex. 2 at 4:17-19.

30 *See*, for example, PFD footnotes 246, 249-253, and 257, which cite to TCMUD 12 Ex. 3 (Direct Testimony of Dr. Zarnikau).

31 PFD at 49, and citations therein to WTCPUA Ex. 2. As discussed in Section VIII.A.1.d., *infra*, TCMUD 12 failed to prove that high costs to entry exist.

TCMUD 12 continues its attempts to misdirect the Commission's examination of the parties' relationship by repeating its unsupported "theory of the case" that the Participant Agreement is evidence of a contractual obligation to "prohibit competition."[32] It is surprising that this misdirection continues in light of the fact that TCMUD 12 witness Zarnikau, who relied extensively and *exclusively* on the provisions of this Participant Agreement to support his statements that there were "formidable barriers to entry,"[33] was entirely unable to state whether *any* of the provisions of the Participant Agreement were legitimate or enforceable. The litany of what Zarnikau did *not* know about this agreement is set forth in detail in WTCPUA's Initial Brief.[34] TCMUD 12's continuation of its argument on this point in its Exceptions does nothing to make Zarnikau's testimony more credible or TCMUD 12's argument more persuasive.

Just as its witness Zarnikau ignored the provisions of the Wholesale Water Services Agreement in his analysis of whether a monopoly existed, TCMUD 12 continues to avoid discussing all of the provisions in that Agreement that demonstrate the non-existence of a monopoly.[35] In fact, the only expert testimony offered on the effect of these contractual provisions was that offered by WTCPUA witness Baudino, who very clearly stated that these contractual provisions are not the types of contractual provisions that one finds in a monopolistic market.[36]

There was no need for the PFD to discuss the Herfindahl-Hirschman Index ("HHI") because it adds no value to the PFD's analysis of whether the WTCPUA is a monopoly. As noted in WTCPUA's Response Brief, an after-the-fact application of the HHI to a sole-source provider circumstance resulting from the 2009 Agreement will necessarily and unavoidably show a higher concentrated market because the concentration is itself caused by the parties'

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32 TCMUD 12 Exceptions at 15.

33 Rebuttal Testimony of Jay Zarnikau, TCMUD 12 Ex. 6 at 18.

34 Initial Brief of WTCPUA at 20-21 (June 26, 2015), and transcript citations contained therein. (WTCPUA Initial Brief).

35 These contractual provisions are listed and discussed in the WTCPUA's Initial Brief at 15-17.

36 WTCPUA Ex. 2 at 12.

agreement.[37] WTCPUA witness Baudino testified that the HHI is inapplicable to the current facts.[38] TCMUD 12's Exceptions offer no new or valid reasons for the ALJ to review his non-reliance on this index.

TCMUD 12's Exceptions at page 18 contain a short discussion of price-inelasticity. As noted *infra* at Section VIII.C., the wholesale water treatment services provided by WTCPUA to TCMUD 12 are not retail services. Rather, they are provided on a wholesale basis to an entity that is not the end-user of the water. Thus, WTCPUA's retail water service area, and the fact that it holds a certificate of convenience and necessity ("CCN") to provide retail utility service within that CCN area, is irrelevant to the Commission's review of a wholesale contract, TCMUD 12's erroneous insistence to the contrary notwithstanding.

A. Bargaining Power of the Parties – No Disparate Bargaining Power Exists

After a thorough review of the record in light of the public interest test factor in 16 TAC § 24.133(a)(3)(A), the ALJ's PFD accurately determined that TCMUD 12 did not meet its burden of proof on this issue because WTCPUA did not have disparate bargaining power over TCMUD 12.[39] Not only did TCMUD 12 fail to provide any evidence on two of the five factors in 16 TAC § 24.133(a)(3)(A)(environmental impacts and regulatory issues), it also failed to provide credible evidence that it did not have alternatives, that it had put forth any meaningful effort to determine alternative costs, or that it had problems in obtaining water service from an alternate provider.

An analysis under 16 TAC § 24.133(a)(3)(A), of the purchaser's alternative means, alternative costs, and problems of obtaining alternative water service, is performed in order to determine whether there is disparate bargaining power between the parties, and thus whether the

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[37] WTCPUA's Response to the Initial Briefs and Closing Arguments at 16 (Aug. 3, 2015). (WTCPUA Response Brief).

[38] WTCPUA Ex. 2 at 28:6-13.

[39] PFD at 28-30.

Protested Rates evidence an abuse of alleged monopoly power (herein referred to as the "alternatives analysis").[40]

TCMUD 12 could not, and did not, provide any credible evidence that it did not have alternative wholesale water treatment service providers available between 2009 and 2013; TCMUD 12 could not, and did not, provide any credible evidence of the costs to receive wholesale water treatment services from an alternative provider between 2009 and 2013; and TCMUD 12 could not, and did not, provide any credible evidence of additional problems in obtaining wholesale water treatment services from an alternative provider between 2009 and 2013.

All of TCMUD 12's listed exceptions to the PFD for this Section attempt to confuse the Commissioners or are contradicted by the record, and should be rejected in their entirety. The ALJ's recommendations, findings of fact and conclusions of law, however, are based upon his thorough analysis of the entire record and should be adopted.

1. Alternative Means of Service and Problems in Obtaining Alternative Service

a. TCMUD 12 is free to seek an alternative.

The PFD correctly determined that TCMUD 12 was free to seek wholesale water treatment services from an alternative provider. While TCMUD 12 claims in its Exceptions that it cannot receive wholesale water treatment services from another utility, the record is rich with evidence that it may.

Initially, the testimony of TCMUD 12's own lay witness, Mr. Joe DiQuinzio ("DiQuinzio"), demonstrated that WTCPUA did not have disparate bargaining power, undermining TCMUD 12's case. Specifically, DiQuinzio testified that at the time TCMUD 12 was searching for an entity to treat its raw water supply in 2009, "the LCRA's[/WTCPUA] West Travis County Regional WTP had [water treatment] capacity to treat the water needed to serve

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[40] 16 TAC § 24.133(a)(3)(A).

the Highlands [TCMUD 12]."[41] Additionally, he attached the 2008 Firm Water Contract between TCMUD 12 and LCRA ("Raw Water Agreement") to his testimony, evidencing that LCRA did not require TCMUD 12 to obtain water treatment services from LCRA.[42] Thus, in 2009, the LCRA/WTCPUA *needed* a customer at the same time that TCMUD 12 was *searching* for a wholesale water treatment services provider. Said another way, without TCMUD 12, the LCRA/WTCPUA was not using available capacity in its water treatment plant and not generating any revenues to pay for such infrastructure. So, LCRA/WTCPUA needed a customer, just as much, if not more, than TCMUD 12 needed LCRA/WTCPUA, because TCMUD 12 was not obligated under the Raw Water Agreement to enter into the 2009 Agreement.

Also, TCMUD 12 acknowledged that it has the opportunity under the 2009 Agreement to obtain wholesale water treatment services from a provider other than the WTCPUA once TCMUD 12 reaches the maximum quantity of water under the 2009 Agreement.[43]

Next, WTCPUA offered TCMUD 12 the opportunity to reduce its maximum quantity of water under the 2009 Agreement. As stated in the testimony of Don Rauschuber, General Manager of WTCPUA, "The WTCPUA Board of Directors provided the wholesale customers with the opportunity to amend their wholesale contracts with the WTCPUA to revise their quantity of wholesale water treatment capacity and living unit equivalent uptake schedule."[44] *In other words, WTCPUA gave TCMUD 12 the opportunity to reduce its maximum capacity to any amount TCMUD 12 wished, which could have been the amount of water it needed in 2013, or less, and would have enabled TCMUD 12 to get service from a third party or to provide service to itself.* The record is also clear that TCMUD 12 rejected that opportunity.[45]

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41 Direct Testimony of Joseph A. DiQuinzio, Jr., TCMUD 12 Ex. 1 at 6:12-13.

42 *Id.* at 63 (JAD Exhibit 2).

43 TCMUD 12 Exceptions at 21.

44 WTCPUA Ex. 1 at 25:6-9.

45 *Id.* at 26:11-13.

The ALJ's determination that the WTCPUA's offer was sincere is also supported by the record, noting that six of WTCPUA's wholesale customers amended their maximum day reservations of water – with some of the WTCPUA's customers reducing their reservations and others increasing their reservations.[46]

Entity	Original Max Day Reservation	Amendment Date	Current Amended Max Day Reservation
Hays County WCID No. 1[47]	345,600 mgd	September 26, 2013	1,221,120 mgd
Hays County WCID No. 2[48]	618,624 mgd	August 14, 2014	1,166,170 mgd
Reunion Ranch WCID[49]	553,000 mgd	March 28, 2014	603,692 mgd
Senna Hills MUD[50]	907,000 mgd	*[51]	575,000 mgd
Lazy 9 MUD[52]	5,068,000 mgd	January 16, 2014	2,080,000 mgd
Barton Creek West WSC[53]	965,952 mgd	March 18, 2014	679,000 mgd

What was insincere was TCMUD 12's assertion that it only had ten days to accept the amendment. The record instead contains evidence that these six wholesale customers amended their contracts between the dates of September 26, 2013, and March 28, 2014, as noted above in the table.[54]

In its Exceptions, TCMUD 12 has to resort to characterizing statements made by the WTCPUA outside the context of a contested case hearing as evidence that a change in methodology occurred, which further evidences the weakness in TCMUD 12's case. As discerned by the ALJ after hearing all evidence in this case from the expert witnesses, the

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46 PFD at 13-14.

47 TCMUD 12 Exs. 7, 8 and 9. Hays County WCID No. 1 has amended its contract twice. The intermediary amendment occurred on April 1, 2004, increasing the max day reservation to 1,843,200 mgd.

48 TCMUD 12 Exs. 10, 11, and 12. Hays County WCID No. 2 has amended its contract three times. The intermediary amendment occurred on September 26, 2013, increasing the max day reservation to 1,137,024 mgd.

49 TCMUD 12 Exs. 14 and 15.

50 TCMUD 12 Exs. 16 and 17.

51 Although the contract is not dated, it is uncontested that the contract was entered into after November 21, 2013. Tr. at 485:16-486:10 (Rauschuber Cross) (Apr. 23, 2015).

52 TCMUD 12 Exs. 18 and 19.

53 TCMUD 12 Exs. 20 and 21.

54 *See* footnotes 47-53, *supra*.

Protested Rates, as compared to the Prior Rates, do not evidence a change in revenue requirement or rate methodology.[55] In addition, the ALJ noted that the crucial use of the word "methodology" does not have the same meaning as in the Public Interest Rule.[56] These arguments are addressed in more detail in Section VIII.B. of this Response, *infra*.

WTCPUA also rejects TCMUD 12's Exception that it did not have any alternatives because accepting the contract amendment and reducing its maximum reserved quantity would entail TCMUD 12 relinquishing its water rights to provide treated water to the Highlands. First, TCMUD 12's rights under the 2009 Agreement are not water rights but instead are the right to receive wholesale water treatment services; TCMUD 12's water supply originates from the Raw Water Agreement, where LCRA sells water to TCMUD 12. Thus, reducing its maximum reservation of wholesale water treatment services has no bearing on its right to a raw water supply. Second, TCMUD 12's Exception is far outside the analysis of 16 TAC § 24.133(a)(1)(A). Rather, this public interest test factor is to determine whether TCMUD 12 has alternatives available. The WTCPUA, in affording TCMUD 12 the opportunity to reduce its maximum capacity, absolutely provided TCMUD 12 with the ability to go to an alternative provider, or itself, to receive such services.[57] In short, the opportunity to amend the 2009 Agreement demonstrated that TCMUD 12 was not locked into receiving services exclusively from WTCPUA. Contrary to TCMUD 12's assertion, the fact that TCMUD 12 had this choice, and was able to reject it, demonstrates that TCMUD 12 has a choice and equal bargaining power as between itself and the WTCPUA, if not more power than WTCPUA. The ALJ realized these truths as well, and his PFD accurately determined that TCMUD 12 has and had the ability to seek wholesale water treatment services from other parties.[58]

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55 PFD at 42 and 44.

56 PFD at 38-39.

57 16 TAC § 24.133(c)(3)(A).

58 PFD at 15-16.

b. Treatment capacity needed is less than 3.98 mgd.

The WTCPUA agrees with the ALJ's analysis that TCMUD 12 did not need 2,125 living unit equivalents ("LUEs") of wholesale water treatment services from WTCPUA at the time of this Petition.[59] TCMUD 12, the party with the burden of proof, contradicts itself, stating on the one hand that "it expects to need the full capacity commitment under the [2009 Agreement] in 7-10 years, or by 2022-2025,"[60] and on the other hand, testifying that TCMUD 12 is unsure as to how quickly and to what degree the District will build-out.[61] What is uncontroverted in the record is that TCMUD 12 only had 132 customers on January 1, 2014, which is less than 10% of 2,125 connections.[62] Accordingly, TCMUD 12 overstated its needs and did not meet its burden of proof that it did not have an alternative for 132 connections of water treatment services at any time.

c. Available alternatives – TCMUD 12 is capable of serving itself.

The ALJ correctly notes that TCMUD 12 itself, a municipal utility district authorized to construct, own, and operate water treatment facilities under Texas Water Code, Chapter 54, is a viable alternative to the WTCPUA for wholesale water treatment services.[63] Logistically, TCMUD 12 is located adjacent to Lake Travis, within approximately one-half mile of the authorized diversion point under the Raw Water Contract.[64] Financially, TCMUD 12 has authorization to issue approximately $84,000,000.00 in bonds[65] to pay for such water infrastructure as well as an agreement with a developer to construct such facilities. Specifically, TCMUD 12 and Rough Hollow Development, Ltd. (the "Developer") had entered into a Utility

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59 *Id.*

60 TCMUD 12 Exceptions at 23.

61 Tr. at 107:13-17 (DiQuinzio Redirect) (Apr. 21, 2015).

62 *See* PFD at 15 (citing WTCPUA's discovery responses that it received from TCMUD 12, which were included in the record as WTCPUA Exs. 43 and 44).

63 PFD at 16.

64 TCMUD 12 Ex. 1 at 85. The WTCPUA's diversion point is on Lake Austin and is nearly five miles to the east of TCMUD 12, as the crow flies. *Id.*

65 Tr. at 30:11-22 (DiQuinzio Cross) (Apr. 21, 2015).

Construction Agreement ("UCA"), whereby Rough Hollow Development, Ltd., agreed to provide advances to the District to construct water infrastructure in return for the District reimbursing the company through the issuance of ad valorem tax bonds, *when* the District was able to do so.[66]

In excepting to the ALJ's findings, TCMUD 12 misleadingly suggests that it does not have the financial ability to become an alternate service provider because it does not currently have the financial ability to construct a water treatment plant capable of treating 3.98 mgd.[67] However, such argument was refuted when it was shown at the hearing on the merits that TCMUD 12 is, in fact, well-positioned to build a wholesale water treatment system, if it wants to.

Specifically, it was revealed in the cross-examination of TCMUD 12 witness DiQuinzio that TCMUD 12 had entered into a certain UCA with the Developer.[68] Under the UCA, the Developer is contractually required to design, construct, and install water utility improvements needed to serve TCMUD 12, known as the Project, and the Developer is required to initially build such improvements at its sole cost. TCMUD 12 is not required to reimburse the Developer for such facilities until it is financially capable of doing so. The relevant portions of the UCA are provided below:

> ARTICLE II. CONSTRUCTION OF THE PROJECT; DEVELOPMENT OF THE PROPERTY; REIMBURSEMENT OF ADVANCES.
>
> Section 1. The Project. The Project consists of (i) water, sanitary sewer, and drainage facilities approved by the District to serve the property described on the attached Exhibit A (the "*Property*")...
>
> Section 4. Cost of Project to be Funded by Developer. The Developer must promptly pay all costs of the Project as they

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66 WTCPUA Ex. 70 at 1-7 (emphasis added).

67 TCMUD 12 Exceptions at 24. Also, pages 25-26 of TCMUD 12's Exceptions contain mathematical analyses that are outside of the record in this case, not subject to cross-examination.

68 Tr. at 584-585 (Apr. 23, 2015).

> become due, including, without limitation, all costs of design, engineering, materials, labor, construction, materials testing, and inspection arising in connection with the Project...In addition, the Developer must advance all costs, including engineering and applications fees, associated with preparation and processing of any application to the Commission for the approval of the Project and Bonds. The District will not be liable to any contractor, engineer, attorney, materialman, or other party employed or contracted with in connection with the Project, but will only be obligated to reimburse the Developer in the manner and to the extent provided in Article III of this Agreement.[69]

In other words, for TCMUD 12 to provide wholesale water treatment services to itself, it does not need the immediate ability to pay to build such facilities. Instead, it had the contractual right to cause the Developer to build the necessary water facilities for the benefit of TCMUD 12, presumably in a quantity necessary to meet demand. There is no obligation under the UCA to issue bonds until it is financially capable to do so. Further, the Developer's contractual commitments are meaningful, as the Developer represented to TCMUD 12 in Article V, Section 1(c) of the UCA that "[t]he Developer has made financial arrangements sufficient to assure its ability to perform its obligations hereunder."[70]

WTCPUA does not oppose the exception filed by the City of Bee Cave, noting that Lakeway Municipal Utility District ("LMUD") could be a viable alternative service provider to TCMUD 12. The record is clear that TCMUD 12 *never* provided written requests for wholesale water treatment services to *any* third parties between 2009 and 2013[71] not even to LMUD, which (1) diverts its raw water at the same location that TCMUD 12 can under its Raw Water Contract;[72] (2) currently serves the Rough Hollow development, which is within TCMUD 11 and

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69 WTCPUA Ex. 70 at 4-5; Tr. at 582-583 (DiQuinzio Cross) (Apr. 23, 2015).

70 *Id.* at 8; Tr. at 583-584 (DiQuinzio Cross) (Apr. 23, 2015).

71 *See* WTCPUA Ex. 24 (showing no records of business dealings with Lakeway MUD regarding obtaining services from that entity); WTCPUA Ex. 25 (showing no written request for service was ever submitted to Lakeway MUD); and WTCPUA Ex. 4 at RFA No. 1-13 (admitting that TCMUD 12 did not send correspondence or documents to any entity other than the LCRA and the WTCPUA in the past ten years regarding the purchase of a wholesale treated water supply for TCMUD 12). Tr. at 66:5-9 (DiQuinzio Cross) (Apr. 21, 2015).

72 Tr. at 71:7-10 (DiQuinzio Cross) (Apr. 21, 2015).

is adjacent to TCMUD 12;[73] and (3) is currently providing potable water service to TCMUD 11, which but for opening a valve, is hydrologically connected to TCMUD 12's water system for the Highlands.[74]

Rather, TCMUD 12's position hinges solely on DiQuinzio's speculations, which are in turn based upon informal conversations with non-decision makers and consultants of several third parties.[75] This is mere conjecture, as DiQuinzio obviously does not know what a third-party may or may not decide. Only the board of directors of a water district can make the decision to provide wholesale water treatment services.

Ultimately, TCMUD 12's Exceptions on this issue omit key facts that only a complete review of the record could determine, which is exactly what the ALJ's PFD accomplishes. TCMUD 12's Exceptions should be rejected.

d. Costs of alternatives.

WTCPUA agrees with the ALJ that TCMUD 12 failed to meet its burden of proof to provide evidence that the cost to construct its own facilities is prohibitive. The ALJ's determination that TCMUD 12's cost estimate is unreliable, inaccurate, and refuted by the WTCPUA is consistent with the evidence in the record.[76]

TCMUD 12 failed to provide any evidence demonstrating that TCMUD 12 knew between 2009 and 2013 what its costs were to obtain wholesale water treatment services for its raw water supply from an alternate provider or from itself. As discussed in the WTCPUA's Initial Brief, the only evidence provided by TCMUD 12 was unsupported, non-expert testimony

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73 TCMUD 12 Ex. 1 at 253 (JAD Exhibit 7).

74 Tr. at 85:3-7 (DiQuinzio Cross) (Apr. 21, 2015).

75 *Id.* at 80:9-18.

76 PFD at 20-23.

from DiQuinzio, prepared two days before DiQuinzio's testimony was filed, that was ultimately refuted by the WTCPUA's capital improvements plan (that was actually sealed by an engineer).[77]

Specifically, TCMUD 12 hinges its case on this issue on DiQuinzio's unsubstantiated, unsupported, non-expert witness testimony that the cost to build a plant, raw water pipe, and barge is $25.2 million.[78] Accurate design and construction cost estimates for water treatment systems are performed by engineers for their clients; DiQuinzio's estimate is unsubstantiated in that regard. There is no sealed engineering report or any other document identifying how the $25.2 million estimate was developed. DiQuinzio only testified that as to the estimate, he relied upon a conversation between TCMUD 12's engineer and a third party, two individuals who did not testify and were not subject to cross-examination.[79] Again, this estimate was not created until a few days before DiQuinzio's testimony was filed in this case.[80] No analysis of the costs to construct facilities was performed beforehand. When asked if he talked with anyone other than Lakeway MUD about adding infrastructure to see if the parties could work together to lower the costs, DiQuinzio testified that he did not.[81]

However, WTCPUA witness Rauschuber provided testimony refuting DiQuinzio's assertion that the cost to build a water treatment system was $25.2 million.[82] Specifically, Rauschuber testified on the potential costs to construct a water treatment system, based upon the costs for similar facilities in WTCPUA's approved capital improvements plan, which was prepared and sealed by the WTCPUA's engineer.[83] Ultimately, Rauschuber's testimony demonstrates that TCMUD 12 has no real understanding of the costs to construct a water

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77 Tr. at 66:10-67:18 (DiQuinzio Cross) (Apr. 21, 2015); WTCPUA Ex. 1 at 29:7-31:10 and Attachment V at 269-270.

78 Rebuttal Testimony of Joseph A. DiQuinzio, Jr., TCMUD 12 Ex. 4 at 20 (Exhibit JAD R1).

79 Tr. at 96:25-97:2 (DiQuinzio Cross) (Apr. 21, 2015).

80 *Id.* at 66:10-67:18.

81 *Id.* at 124:12-125:3.

82 WTCPUA Ex. 1 at 29:12-19.

83 *Id.* at 251 (Exhibit V).

treatment system, much less an appropriately-sized plant for 132 connections, not 2,125 connections.

Said another way, TCMUD 12's estimate is not only unreliable, but it is also not applicable to this case. DiQuinzio admitted that TCMUD 12 does not need 3.98 mgd of capacity today, and that the water system would be expanded to 3.98 mgd over time and in phases.[84] Thus, the alternative costs to meet TCMUD 12's current needs are much less than proposed, and are not identified by TCMUD 12, the party with the burden of proof in this hearing.

As to TCMUD 12's payment of $1.5 million in connection fees, it is critical in this alternatives analysis, and was overlooked by TCMUD 12, that TCMUD 12, as "a very young district",[85] will pay for water treatment infrastructure necessary to treat its raw water supply, regardless of whether TCMUD 12 or the WTCPUA (or any third party) builds such facilities. Here, for each LUE of wholesale water treatment services that WTCPUA provides TCMUD 12 under the 2009 Agreement, TCMUD 12 pays the WTCPUA a Connection Fee.[86] As contemplated in Section 4.01.c. of the 2009 Agreement, the Connection Fee "has been designed to fund or recover all or a part of the Costs of the LCRA System for capital improvements or facility expansions intended to serve 'new development'" (namely, the WTCPUA's barge, water pump, pipelines, water treatment facilities, and other related capital improvements) for each LUE.[87] The bottom line is that regardless of whether the WTCPUA or TCMUD 12 is providing wholesale water treatment services, TCMUD 12 is paying for the central water treatment infrastructure in either case. Further, since TCMUD 12's reservation of capacity is guaranteed by the 2009 Agreement, it has a transferrable investment (not expense) in the WTCPUA system, and it can avoid paying for both the WTCPUA and its own system by selling its capacity in the

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84 Tr. at 68:6-15 (DiQuinzio Cross) (Apr. 21, 2015).

85 *Id.* at 90:24-25.

86 WTCPUA Ex. 1 at 75 (Attachment G).

87 *Id.* at 76 (Attachment G at 10).

WTCPUA system.[88] As evidenced by the net increase in reserved capacity by the six wholesale customers of the WTCPUA that agreed to amend their contracts, the overall demand for service from WTCPUA is increasing.[89]

TCMUD 12's Exceptions overlook the fact that TCMUD 12 has the burden of proof in this case, and the ALJ's analysis makes that point clear.[90] The evidence in the record shows that the cost for TCMUD 12 to construct a water treatment plant, based upon a back-of-a-cocktail-napkin analysis performed by TCMUD 12, two days before DiQuinzio's testimony was due, was refuted by the cost analysis of the formal adopted Capital Improvements Plan sealed by the WTCPUA's engineer, and the actual amount of service needed. WTCPUA agrees with the PFD that TCMUD 12 did not meet its burden of proof.[91]

2. Other Bargaining Power Factors

a. Connection fee in prior rates.

WTCPUA's modification of the Connection Fee, as authorized under the 2009 Agreement, is not relevant to this matter concerning the Protested Rates. WTCPUA agrees with the ALJ that if TCMUD 12 disputes the WTCPUA's prior change to the Connection Fee, the proper venue for such challenge is district court, not the Commission.

Regardless, a review of the 2012 Amendment in its entirety reveals that, contrary to TCMUD 12's assertions in its Exceptions, WTCPUA has the authority to amend such fees. Specifically, Section 6 of the 2012 Amendment states "[b]y execution of this Agreement, the District expressly consents to the LCRA's assignment of all of its rights, title, interest, obligations, and responsibilities under the [2009 Agreement] to the [WTC]PUA . . ."[92] Further, Section 4.01.a. of the 2009 Agreement provides that "[f]or the term of this Agreement, the

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88 *Id.* at 75 and 85.

89 PFD at 13-14.

90 PFD at 23.

91 *Id.*

92 WTCPUA Ex. 1 at 106 (Attachment J).

Connection Fee will be the amount established from time to time in the LCRA Rate Schedule for the rate district in which the District Service Area is located . . ."[93] This Exception should be rejected.

b. Option to amend contract.

WTCPUA's offer to TCMUD 12 and to all of its wholesale customers to amend their respective maximum reservations of water services does not indicate that WTCPUA has disparate bargaining power. Further, the fact that some customers decided to amend their contracts, while others (including TCMUD 12) did not, shows that WTCPUA did not have unilateral power to compel its customers to enter into the amendment. As shown on the table on pages 13-14 of the PFD, some customers decided to increase their maximum reserved capacity and others elected to reduce their capacity. Further, WTCPUA re-asserts its arguments regarding the contract amendment provided in Section VIII.A.1.a., *supra*. TCMUD 12's Exception on this issue should be rejected.

c. Input before protested rates implemented.

WTCPUA's decision to schedule, notify, and hold six meetings with its wholesale customer committee, as well as offering those customers the opportunity to have additional one-on-one meetings regarding the Protested Rates, does not demonstrate disparate bargaining power or an abuse of power.[94] Rather, these meetings provided those customers, including TCMUD 12 (who did not attend all of these meetings)[95] with the opportunity to provide meaningful input. Rauschuber testified that this input was taken into consideration by WTCPUA.[96] Thus, WTCPUA agrees with the determinations of the ALJ rejecting TCMUD 12's Exception on this issue.

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93 *Id.* at 75.

94 *Id.* at 22-24.

95 *Id.* at 235-244 (Attachment U).

96 *Id.* at 22-24.

d. WTCPUA's risk of losing TCMUD 12 as a customer.

TCMUD 12's Exceptions to this Section contradict the testimony of its witness, Joe DiQuinzio. Specifically, as stated in Section VIII.A.1.a., *supra*, DiQuinzio testified that at the time TCMUD 12 was searching for an entity to treat its raw water supply in 2009, "the LCRA[/WTCPUA] West Travis County Regional WTP had [water treatment] capacity to treat the water needed to serve The Highlands [TCMUD 12]."[97] In other words, in 2009, TCMUD 12 had the power to select any service provider of its liking, including itself, and LCRA had available capacity to sell. The WTCPUA echoes the assessment of the ALJ on this issue.

TCMUD 12's Exception that WTCPUA cannot have it both ways is misplaced.[98] There is a significant, meaningful difference between finding a customer who needs capacity and selling a customer the right amount of capacity. The results from the WTCPUA's offer to allow its customers to amend their wholesale contracts proves that point, as some of WTCPUA's customers decided to reduce their maximum capacity while others increased theirs. As testified by Don Rauschuber, providing the wholesale customers with the opportunity to update their maximum reserved capacities would "more accurately reflect the amount of water treatment capacity needed from WTCPUA over time."[99] In other words, the WTCPUA can identify and sell the unused capacity, instead of holding it and building additional unnecessary facilities. These Exceptions should be rejected.

e. ALJ's conclusion concerning disparate bargaining power – none exists.

The ALJ's PFD correctly determined that based upon the evidence in the record, TCMUD 12 did not meet its burden of proof that WTCPUA had disparate bargaining power over TCMUD 12. In fact, the PFD makes it abundantly clear that no disparate bargaining power

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[97] TCMUD 12 Ex. 1 at 6:12-13.

[98] The two ways were (1) LCRA needing a TCMUD 12 as a customer in 2009 and (2) WTCPUA offering TCMUD 12 to modify its reserved quantity of water in 2013. TCMUD 12 Exceptions at 31.

[99] WTCPUA Ex. 1 at 25:11-12.

existed at any time between when the 2009 Agreement was executed and when the WTCPUA adopted the Protested Rates.[100] WTCPUA agrees.

TCMUD 12 has acknowledged that LCRA needed a customer in 2009 when it decided to enter into the 2009 Agreement.[101] As to the Protested Rate, TCMUD 12 first erroneously claims (and will be discussed in more detail in Subsection B, below) that an alleged change in rate methodology equates to disparate bargaining power. Such allegation is not only wrong (because there was no change in revenue requirement or rate methodology) but it is also beyond the factors of 16 TAC § 24.133(a)(3)(A). Second, TCMUD 12 repeatedly makes the same mistake regarding the WTCPUA's offer to amend the wholesale contract. Nowhere in the record does WTCPUA testify that it offered the contract amendment to unilaterally impose a rate methodology. Rather, the testimony of Don Rauschuber explains that the purpose of the offer for its wholesale customers to amend their contracts was to modify their maximum reserved capacity.[102] Again, the offer to allow its customers to amend their contracts and the result that only six customers decided to amend such contracts evidences that (1) TCMUD 12 could have sought out alternatives, and (2) WTCPUA could not force its customers to amend their contracts.[103] Accordingly, WTCPUA did not have disparate bargaining power over TCMUD 12.

As to WTCPUA's decision to create a wholesale customer committee and hold six meetings, TCMUD 12 boldly asserts in its Exceptions that "[h]olding a meeting does not equate with making any concessions or modifications based upon the feedback given by the wholesale customers..."[104] However, fatal to TCMUD 12's assertion, Don Rauschuber's testimony

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100 PFD at 28-30.

101 TCMUD 12 Ex. 1 at 6:12-13.

102 WTCPUA Ex. 1 at 25:6-12.

103 *Id.* at 26:3-5.

104 TCMUD 12 Exceptions at 32.

expressly states that WTCPUA incorporated the feedback provided by the customers at those meetings in its analysis of the wholesale rates, which include the Protested Rates.[105]

Regardless, as noted by the ALJ, WTCPUA, in adopting the Protested Rates, reduced both the Monthly Charge and the Volumetric Fee, to prices significantly below the Prior Rates. The Protested Rates were, in fact, the lowest rates that TCMUD 12 had ever been charged – even when TCMUD 12 had no customers in 2008 and 2009 and when it had ten or fewer customers in 2010 and 2011.[106] With 132 customers on the effective date of the Protested Rates,[107] such rate change does not and cannot amount to an abuse of any alleged, non-existent disparate bargaining power.

B. Methodologies for Computation of Revenue Requirement and Rates Are the Same in the Protested Rates and Prior Rates

WTCPUA concurs with the ALJ's PFD that the WTCPUA, in adopting the Protested Rates, did not change the computation of the revenue requirement or rate from one methodology to another, as compared to the Prior Rates. The record contains *uncontroverted* evidence that the WTCPUA, in both the Protested Rates and Prior Rates, utilized the cash basis revenue requirement methodology and employed a minimum Monthly Charge and Volume Rate methodology.[108]

Since these methodologies did not change, TCMUD 12's Exceptions can only attempt to look beyond the revenue requirement and rate methodologies and analyze the WTCPUA's Proposed Amendment and the *allocation* of its costs of service. First, as stated in Subsection A, above, the General Manager of the WTCPUA testified that the purpose of the proposed amendment was to provide its wholesale customers with an opportunity to modify their reserved

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105 WTCPUA Ex. 1 at 23:4-24:28.

106 *Id.* at 160 (Attachment M) and at 66-67 (Attachment G); PFD at 15.

107 *Id.* at 231-232 (Attachment S).

108 WTCPUA Ex. 3 at 11-15 and at 17:1-23; Staff Ex. 1 at 9 and at 11:3-10; Tr. at 198-199 (Joyce Cross) (Apr. 21, 2015); Tr. at 168:21-25 (Joyce Cross) (Apr. 21, 2015); WTCPUA Ex. 4 at RFA No. 1-8; WTCPUA Ex. 6 at RFA Nos. 3-1 and 3-2; WTCPUA Ex. 5 at RFA Nos. 2-1, 2-2, 2-3, and 2-4.

capacities, and not to obtain approval of a new rate formula as suggested by TCMUD 12. Second, TCMUD 12's analysis of WTCPUA's cost of service for the Protested Rates is outside the parameters of a public interest hearing. Specifically, examining the ratemaker's cost of service is inadmissible under the Commission's public interest rule, 16 TAC § 24.133(b):

> The commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service.[109]

Last, the PFD correctly determined that the Protested Rates, in being lowered from the WTCPUA's previous Prior Rates, and even being lower than the amounts that TCMUD 12 and LCRA originally negotiated and incorporated in the 2009 Agreement, do not and cannot constitute an abuse of any alleged monopoly power:

Table 1: Summary of Wholesale Water Service Rates to TCMUD 12[110]

	Rates Per TCMUD 12 Agreement with LCRA	Initial Rates Adopted 03/19/2012	Prior Rates Adopted 11/15/2012	Protested Rates Adopted 11/21/2013
Monthly Charge	$9,430.00	$9,430.00	$10,891.65	$8,140.89
Flat Volume Rate	$2.40 per 1,000 gallons	$2.40 per 1,000 gallons	$2.77 per 1,000 gallons	$2.11 per 1,000 gallons

Therefore, TCMUD 12's Exceptions should be rejected in their entirety.

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109 16 TAC § 24.133(b).

110 WTCPUA Ex. 1 at 32 (Table 1).

1. **Alleged Change in Revenue-requirement Computation Methodology**

2. **Computation Methodology and Cost-of-Service Analysis**

3. **Evidence Does Not Show WTCPUA Changed its Revenue Requirement Computation Methodology**

a. WTCPUA's revenue requirement methodology did not change.

WTCPUA agrees with the analysis and findings in the PFD that WTCPUA used the cash basis methodology to compute the revenue requirement for the Prior Rates and Protested Rates. 16 TAC §§ 24.133(a)(3)(C) and 24.133(b) clearly establish the focus of the Commission's analysis, which is to determine whether "the seller changed the computation of the revenue requirement or rate from one methodology to another."[111] In performing such analysis, "[t]he commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service."[112] Here, the PFD answers the question of whether a change in revenue requirement occurred, directly and unconditionally, as follows: *"[A]ll of the pertinent testifying experts agreed that WTCPUA used the cash-needs method for both the Prior Rates and Protested Rates*," citing to the prefiled and live testimony of the expert witnesses for WTCPUA, TCMUD 12, and the Commission.[113] WTCPUA supports this important and definitive finding.

As TCMUD 12 cannot refute this uncontroverted testimony, its Exceptions attempt to shift the focus away from this critical determination. TCMUD 12's discussion of each of the four revenue requirement methodologies that are in the Commission's rules, as noted by the ALJ in the PFD, is superfluous. The question in 16 TAC § 24.133(a)(3)(C) has already been answered; the WTCPUA used the cash basis for the Protested Rates and Prior Rates. Said another way, regardless of how many revenue requirement methodologies may exist, the rate-making expert witnesses from TCMUD 12, WTCPUA, and the Commission all agreed in this

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111 16 TAC § 24.133(a)(3)(C).

112 16 TAC § 24.133(b).

113 PFD at 34.

case that the WTCPUA used the cash basis in computing the Protested Rates and Prior Rates. Thus, the revenue requirement methodology did not change.

b. TCMUD 12's Exceptions are based upon a cost of service analysis and are inadmissible under 16 TAC § 24.133(b).

Having no evidence regarding any change in the revenue requirement (or rate) methodology between the Protested and Prior Rates does not give TCMUD 12 license to insert and analyze WTCPUA's cost of service or cost allocation in this phase of this case. Such analysis is in direct violation of 16 TAC § 24.133(b).[114] Nevertheless, TCMUD 12's Exceptions to the ALJ's reconciliation of 16 TAC §§ 24.133(a)(3)(C) and 24.133(b) reiterate TCMUD 12's desire for the Commission to improperly analyze WTCPUA's inadmissible cost of service.

WTCPUA supports the ALJ's findings in these sections to reconcile 16 TAC §§ 24.133(a)(3)(C) and 24.133(b), as well as each of the ALJ's seven reasons why TCMUD 12's claims regarding the Protested Rates do not evidence a change in revenue requirement methodology.[115] Additionally, WTCPUA opposes TCMUD 12's Exceptions requesting the Commission to consider inadmissible cost of service data and proposing a flawed interpretation of 16 TAC §§ 24.133(a)(3)(C) and 24.133(b).

(i) PUC Order concerning ALJ Order No. 6 can be reconciled with 16 TAC § 24.133(b).

TCMUD 12's Exceptions mistakenly claim that the Commission's ruling regarding the appeal of the ALJ's Order No. 6 in this case, an order regarding a discovery dispute, makes the analysis of WTCPUA's a cost of service admissible in this public interest, regardless of 16 TAC § 24.133(b).[116] However, the Commissioners made no indication that they believed the information requested was actually *relevant* to or *admissible* in this proceeding.[117] Rather, and

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[114] 16 TAC § 24.133(b).

[115] PFD at 38-42.

[116] TCMUD 12's Initial Brief at 17, citing Order on Appeal of SOAH Order No. 6.

[117] Order on Appeal of SOAH Order No. 6.

fatal to TCMUD 12's claim, the Commission's ruling merely required the WTCPUA to make the discovery documents available.

As TCMUD 12 argued in its motion to compel, the "scope of discovery is wider than the scope of what is admissible at a hearing, so that discovery may be had of even inadmissible evidence if the information sought is 'reasonably calculated to lead to the discovery of admissible evidence.'"[118] The fact that this information was determined to be *discoverable* by the Commission does not make it *relevant*. TCMUD 12's Exception attempting to make the WTCPUA's cost of service analysis relevant in this hearing, through the overturning of SOAH Order No. 6 concerning discovery, is over-reaching and should be rejected.

(ii) Preamble to Public Interest Rule does not support analysis of cost of service.

Similar to its attempt to ignore the uncontroverted testimony regarding the WTCPUA's revenue requirement, above, TCMUD 12's Exceptions also overlook the critical portions of the Preamble to the Public Interest Rule ("Preamble").[119] As discussed above, 16 TAC § 24.133(b) clearly and unambiguously renders the seller's cost of service inadmissible to determining whether the public interest will be adversely affected by the seller's rates. Through this rule, the Commission has placed cost of service evidence "completely off the table" and "all cost-of-service evidence is irrelevant in the public-interest hearing."[120] WTCPUA agrees with the PFD that the Preamble to this rule supports such interpretation.[121]

In addition, the Preamble contains additional stated intentions to eliminate the cost of service analysis in the first phase, going well beyond TCMUD 12's cited excerpt that the test does not demand that a wholesale rate equal the seller's cost of providing service to the customer. Specifically, as shown below, the Preamble clearly memorializes the desire that the

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[118] TCMUD 12's Motion to Compel the WTCPUA Responses to TCMUD 12's Third Requests for Information at 3 (Oct. 7, 2014).

[119] WTCPUA Ex. 76 at 6227.

[120] SOAH Docket No. 582-10-1944, TCEQ Docket No. 2009-1925-UCR, PFD at 22.

[121] PFD at 41.

cost of service methodology analysis be excluded from the first phase of the public interest analysis altogether:

> The commission concludes that under the adopted bifurcated hearing procedure the commission should not consider cost of service in determination on public interest. The Commission relies upon three rationales to reach this conclusion.
>
> First, the adopted public interest criteria and related factors seek the facts which lie at the heart of disputes concerning wholesale rates...
>
> Second, the commission concludes the determination of the seller's cost of service is not as reliable a mechanism to determine the public interest as some commenters believe. The discussions at the public meeting showed generally that there will be as many different determinations of cost of service as experts who are asked the question...
>
> Third, the use of cost of service to determine the public interest does not give sufficient deference to contractual agreements between the seller and purchaser.[122]

TCMUD 12's Exceptions requesting the Commission to allow in cost of service information would essentially eliminate the bifurcated process. The Preamble stresses the importance of having a bifurcated process, stating that "[t]he bifurcated approach will serve to identify frivolous appeals and more efficiently process legitimate ones."[123]

(iii) AWWA M1 Manual can be reconciled with 16 TAC § 22.133(b).

In further support of the PFD, the WTCPUA urges the Commission to consider and apply the three-step Cost of Service Study process in American Water Works Association's "Principles of Water Rates, Fees, and Charges," known as the AWWA M1 Manual ("M1 Manual"), to this case. As citied by the PFD, the M1 Manual is a treatise relied upon by experts in the water ratemaking industry, including the expert witnesses of WTCPUA, TCMUD 12, and the

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[122] WTCPUA Ex. 76 at 6228, second and third columns.

[123] *Id.* at 6227-6228.

Commission.[124] While the M1 Manual is not a Commission rule, it is has meaning in helping interpret the Commission's rules as a technical document.

Because they have the force and effect of statutes, administrative rules are construed the same as statutes.[125] The primary objective in the construction of statutes is to ascertain and give effect to the drafters' intent, which is determined from the ordinary meaning of the words.[126] If a statute is unambiguous, the interpretation supported by the plain language is adopted, unless the interpretation will lead to "absurd results."[127] However, "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."[128] Therefore, when technical terms are not defined, the term must be interpreted in light of the testimony of expert witnesses that are familiar with that particular art, science, or trade.[129] If technical or other specialized knowledge will assist the Commission in understanding the evidence or determining a fact in issue, a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."[130]

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[124] PFD at 36.

[125] *AEP Texas Commercial & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Texas*, 436 S.W.3d 890, 905-06 (Tex. App.—Austin 2014, no. pet. h.) ("AEP Texas").

[126] *AEP Texas*, 436 S.W.3d at 906; Tex. Gov't. Code Ann. § 312.005 (West 2013).

[127] *AEP Texas*, 436 S.W.3d at 906.

[128] Tex. Gov't Code § 311.011(b) (West 2013).

[129] *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 642-43 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) *citing Order of Railway Conductors v. Swan*, 329 U.S. 520, 525-28 (1947); *Texas Alcoholic Beverage Comm'n v. Major Brands of Texas, Inc.*, 492 S.W.2d 616, 620 (Tex. Civ. App.—Austin 1973, no writ).

[130] Tex. R. Evid. 702.

The M1 Manual establishes a three-step process for cost-based ratemaking, known as a "*Cost of Service Study*":[131]

> (1) Revenue Requirement Analysis–"Compares the revenues of the utility to its operating and capital costs to determine the adequacy of the existing rates to recover a utility's costs"
>
> (2) Cost-of-Service Analysis–"*Allocates* the revenue requirements to the various customer classes of service in a fair and equitable manner"
>
> (3) Rate-Design Analysis–"Considers both the level and structure of the rate design to collect the distributed revenue requirements from each class of service"[132]

In short, the "*Cost of Service Analysis*" is the second step in a "*Cost of Service Study*," and it is the Cost of Service Analysis that is inadmissible evidence under 16 TAC § 24.133(b) because it is the only step that considers the *allocation* of costs. Even TCMUD 12 witness Joyce agrees that a "cost of service study" is different than the "cost of service," and that a "cost of service study" has several parts to it.[133]

TCMUD 12's testimony – and now Exceptions – have been focused on the *allocation* of WTCPUA's costs[134] to each customer class based on the cost to serve each customer. However, a change in a utility's *allocation* of its revenue requirement is not a change in methodology relating to the first step in the AWWA Cost of Service Study process – the Revenue Requirement Analysis. Rather, this change in *allocation* is part of the second step in such process – the Cost of Service Analysis, which cannot be examined in determining whether the rates are adverse to the public interest.

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131 WTCPUA Ex. 73 at 5.

132 *Id.* (emphasis added).

133 Tr. at 153:8-13 (Joyce Cross) (Apr. 21, 2015).

134 PFD at 30-31.

c. Rejected contract amendment is not a change in revenue requirement or rate methodology and has no bearing on this case.

TCMUD 12's Exception that the WTCPUA's offer to amend the 2009 Agreement, which TCMUD 12 rejected, contains a change in methodology should be rejected because (1) it inappropriately concentrates on changes in *allocations*, which, again, fall within a cost of service examination that is not permitted in this proceeding, and (2) it misapplies the word "methodology" as used outside of a contested case hearing to this contested case hearing.

First, TCMUD 12's Exceptions are solely based upon alleged changes in how WTCPUA *allocated* its costs to its customers and customer classes, which is an analysis of the WTCPUA's cost of service.[135] The PFD supports this contention.[136] Further, a comparison of TCMUD 12's Tables JJJ-T3 and JJJ-T4 with Table 5A reveals that TCMUD 12's Tables T3 and T4 are inconsistent with WTCPUA's rate Table 5A.[137]

Second, as the WTCPUA noted in its Reply Brief, each of the references TCMUD 12 makes to the WTCPUA's use of the term "methodology" in this section of its Exceptions are referring to cost allocation methods and should not be interpreted to relate to a revenue requirement or rate methodology. For example, the term "wholesale rate methodology" when used by WTCPUA in the resolution approving the form contract amendment[138] refers to the cost of service or cost allocation process. The formulas approved by the Wholesale Customer Committee and referenced in the form contract amendment all address the way in which the WTCPUA's revenue requirement was to be allocated among its customers. While individuals may be casual in their use of words on a day-to-day basis and outside of a courtroom, parties in a hearing on the public interest test must look "behind the curtain" to understand what such individuals truly meant. TCMUD 12 made the same arguments in its Closing Briefs regarding

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135 WTCPUA Ex. 3 at 26:11-13.

136 PFD at 46.

137 Compare Direct Testimony of Jay Joyce, TCMUD 12 Ex. 2 at 16:7-13 with TCMUD 12 Ex. 2 at 86 (JJJ-13).

138 WTCPUA Ex. 1 at 209 (Attachment Q).

WTCPUA's use of term "methodology" outside of the courtroom, and the ALJ was not persuaded by such claims.

4. Alleged Changes in Rate Computation Methodology

5. Evidence Does Not Show WTCPUA Changed its Rate Computation Methodology

Like the analysis of the revenue requirement methodology used by WTCPUA in the Protested Rates and Prior Rates, it is *uncontroverted* that the WTCPUA's rate methodology did not change between the Protested Rates and Prior Rates under 16 TAC § 24.133(a)(3)(C). Specifically, the ratemaking expert witnesses for TCMUD 12, WTCPUA, and the Commission agreed that the rate structure for the Prior Rates and the Protested Rates was a Monthly Charge and a Volume Rate.[139] Again, the Monthly Charge and Volume Rate in the Protested Rates are significantly lower than the Prior Rates, and, in fact, lower than the rates that the LCRA and TCMUD 12 originally agreed to in the 2009 Agreement.

However, once again, TCMUD 12's Exceptions ignore these truths, and they also fall short in their attempt to assert that there was a change in rate methodology. Specifically, TCMUD 12's Exceptions not only assert claims regarding the Volume Rate that would entail analyzing the WTCPUA's cost of service, which is inadmissible in this public interest hearing under 16 TAC § 24.133(b), but also fail in accuracy (in the event the claims are even considered). The Commission should reject such Exceptions and instead adopt the well-supported findings of the PFD, as written.

WTCPUA supports the finding of the PFD that the M1 Manual provides guidance regarding what constitutes a change in a rate. M1 Manual's three-step process to calculate a water rate provides that in the third step, the Rate Design Analysis, the utility should consider the "level and structure of the rate design to collect the distributed revenue requirements from each

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[139] Tr. at 168:21-25 (Joyce Cross) (Apr. 21, 2015); WTCPUA Ex. 4 at RFA No. 1-8; WTCPUA Ex. 6 at RFA Nos. 3-1 and 3-2; WTCPUA Ex. 5 at RFA Nos. 2-1, 2-2, 2-3, and 2-4; Staff Ex. 1 at 11:3-10; WTCPUA Ex. 3 at 17:1-23.

class of service."[140] Further, the M1 Manual explains that the rate design analysis examines the "different *rate structures* that may be used to collect the appropriate level of revenues from each customer class of service."[141] Thus, a change to the "rate structure" would be a change in rate methodology. However, as noted in WTCPUA's Reply Brief, TCMUD 12 concedes that WTCPUA's rates included a Monthly Charge and a Volume Rate, just as TCMUD 12 witness Joyce stated at the hearing.[142] No change in the rate methodology occurred.

TCMUD 12's Exception to the PFD regarding the *allocation* of water losses to the Volume Rate charged to TCMUD 12 is improper because the *allocation* of such costs to WTCPUA's customers is an analysis of the WTCPUA's cost of service. Such analysis is squarely within Step 2 of the M1 Manual's Cost of Service Study process – the Cost of Service Analysis,[143] and is prohibited in this public interest phase under 24.133(b). Staff witness Graham testified that she did not look at the various methodologies for allocating costs.[144] Similarly, WTCPUA witness Stowe explained that it is "abundantly clear that any allocation amongst service functions and/or customer classes are within the cost of service process."[145]

Regardless, to the extent that this exception is considered, it is inaccurate because the evidence shows that WTCPUA did include water losses in the Prior Rates. In Nelisa Heddin's December 11, 2012 correspondence to Jay Joyce, Response to Specific Questions 1, she stated that "[l]ost and unaccounted for water was not *allocated* between retail and wholesale customers for the following reasons..."[146] This has been misinterpreted by TCMUD 12 to mean that water losses were not charged altogether. This is inconsistent with Ms. Heddin's statement that speaks to *how* losses were allocated among customer classes. Further, it is important to note that under

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140 WTCPUA Ex. 73 at 5.

141 *Id.* at 6 (emphasis added).

142 Tr. at 168:21-25 (Joyce Cross) (Apr. 21, 2015); TCMUD 12's Initial Brief at 48.

143 WTCPUA Ex. 73 at 5 (emphasis added).

144 Tr. at 400:12-14 (Graham Cross) (Apr. 22, 2015).

145 WTCPUA Ex. 3 at 26:11-13.

146 TCMUD Ex. 2 at 45, Exhibit JJJ-5 at 5 (emphasis added).

the 2009 Agreement, the Volume Rate "shall be designed primarily to recover the operation and maintenance related Costs of the LCRA System," and the definition of the "Costs of the LCRA System" states that it "means all of LCRA's reasonable and necessary costs...including, without limiting the generality of the foregoing, the costs of reasonable water losses within the LCRA System..."[147] There is no evidence in the record that WTCPUA's Protested or Prior Rates are inconsistent with this contractual requirement, or that WTCPUA charges TCMUD 12 for the raw water it already purchased from LCRA under the Raw Water Contract, as opposed to water lost by WTCPUA in performing its obligations under the 2009 Agreement. Thus, TCMUD 12's Exception regarding the Volume Rate should be rejected.

TCMUD 12's final exception concerning the change in quantity of the Volume Rate from a uniform rate in the Prior Rates to different, unique rates in the Protested Rates, should also be rejected because such change is not a change in rate methodology. As stated in its Reply Brief, the WTCPUA does not dispute that the cost to serve each customer was examined in the cost of service study and allocated to customers based on their peak usage rather than charging each customer uniform Volume Rate.[148] However, the rate methodology (i.e., rate structure) did not change because the variable rates remained consistent with respect to the structure of the rates, rather than changing to another rate methodology, such as from a flat volume rate to an inclining block rate (as in the *Appeal of Navarro County Wholesale Ratepayers to Review the Wholesale Rate Increase Imposed by the City of Corsicana, Certificate of Convenience and Necessity No. 10776, in Navarro County*, SOAH Docket No. 582-10-1944, TCEQ Docket No. 2009-1925-UCR).

Here, the only changes that were associated with the Protested Rates dealt with the *allocation* of costs to customers, which is an analysis of the WTCPUA's Cost of Service, not the WTCPUA's rate design. In any event, the WTCPUA adjusted the allocations of costs to be more

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147 WTCPUA Ex. 1 at 68 (Attachment G).

148 WTCPUA Reply Brief at 59.

equitable to each customer by *allocating* costs based on each customer's use of capacity rather than imposing a uniform rate on all wholesale customers with different peak demands.[149] As the WTCPUA's rate analyst explained, the allocation changes alleviated cross subsidization and require growth to pay for itself rather than socializing those costs.[150]

Even if the unique volume charges were to be considered a "change in rate methodology," TCMUD 12 has not excepted to the PFD's finding that such change does not amount to an abuse of alleged monopoly power. The Volume Rate in the Protested Rate is more than 23% lower than the Volume Rate in the Prior Rate, where the rate dropped from $2.77/1,000 gallons to $2.11/1,000 gallons.

C. Evidence Does Not Show That WTCPUA is a Monopoly or Has Abused Any Monopoly Power it Might Have.

The PFD appropriately makes short shrift of TCMUD 12's argument that the WTCPUA is a wholesale monopoly because it is a retail public utility, which by definition is a monopoly.[151] WTCPUA agrees with the PFD and urges the Commission not to get caught up in semantics when rationality outweighs the simplistic interpretation offered by TCMUD 12.

The WTCPUA does not provide retail water utility services to TCMUD 12, nor to any of its other wholesale water treatment service customers. Only in its Exceptions does TCMUD 12 pay more than lip service to the concept that the mere definition of "retail public utility" in the Texas Water Code compels a conclusion that the WTCPUA is a monopoly.[152] Yet even in the latest argument, TCMUD 12 is unable to make a cogent argument that a wholesaler, in its provision of wholesale services, is *ipso facto* a monopolist. Such a conclusion has never been adopted by the State of Texas, acting through any of the administrative agencies tasked with the

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149 WTCPUA Ex. 3 at 156 (Attachment E).

150 Rebuttal Testimony of Jay Joyce, TCMUD 12 Ex. 5 at 84-85, JJJ Exhibit R9 at 9-10.

151 PFD at 47-48.

152 In its Initial Brief, TCMUD 12 dedicated one paragraph to this argument (pages 21-22). An even shorter paragraph was included in TCMUD 12's Reply Brief (page 16).

review of wholesale rates. Indeed, the entire regulatory scheme imposed upon *retail* utilities is inapplicable to *wholesale* providers, and the result urged by TCMUD 12 is logically unavailable.

In the interest of brevity, WTCPUA provides an abbreviated list of all the reasons why TCMUD 12's position is insupportable under the regulatory scheme set forth in Chapter 13 of the Texas Water Code:[153]

1) TWC § 13.002(19), includes in the definition of retail public utilities those entities providing potable water service for compensation;

2) retail water utility services are provided to an exclusive service area pursuant to a water or sewer CCN;

3) wholesale water treatment services are provided under contract;

4) a comprehensive regulatory scheme over retail water utility service is provided as a substitution for competition (TWC § 13.001(b)(3));

5) the regulatory scheme is accomplished both by the rate regulations and the exclusive service territory provisions in Chapter 13;

6) this comprehensive regulatory scheme does not apply to wholesale water service providers;

7) the regulatory provisions of Chapter 13 of the Texas Water Code are not applied to the provision of wholesale water treatment services;

8) appeals of rates charged under wholesale water contracts are separate and independent of rates charged by retail public utilities;

9) the courts have specifically instructed the state agencies that the wholesale contracts must be deferred to, and rates charged thereunder disturbed only in very specific and compelling circumstances;

10) there would be no point to the public interest criteria found in 16 TAC § 24.133 if a wholesaler who also happens to be a retail public utility is a monopoly "by definition";

11) if wholesale providers are by definition monopolies, with exclusive service areas and captive customers, there would be no point in examining the bargaining power of the parties (no one bargains with the entity that provides potable water to one's home), and there would be no point in examining the purchaser's alternative means if, by definition, a monopoly already exists;

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[153] These considerations were discussed in greater detail in WTCPUA's Reply Brief at 18-19.

12) an entity seeking to provide retail water services must obtain a CCN from the Commission in order to do so, unless it is specifically exempted by law from such requirement;

13) a water CCN grants a monopoly status in a specific area (hence the "by definition" phrase in TWC § 13.001(b)(1)), therefore the applicant for a CCN must prove its worthiness to obtain such a monopoly by showing through a detailed application process (and potentially through a contested case proceeding) that it possesses the financial, managerial, and technical capability to provide continuous and adequate service;

14) an entity intending to provide wholesale water services is under no such scrutiny – it must only have the means to provide the service and the ability to negotiate the terms under which such service is offered to its customers, who are not the end-use consumers of the water services;

15) the award of a water CCN by the Commission creates the monopoly "by definition," by granting to the water CCN holder the exclusive right to provide retail water utility services to the territory that is specifically identified in the CCN.

16) detailed maps of the proposed water CCN area must be filed, in both digital and hard-copy formats, before an application for a new CCN or an amended CCN will even be accepted for filing – the mapping of retail water service areas is highly detailed and meticulous;

17) once the water CCN is awarded, the CCN holder may stave off all retail competition in its CCN territory, and may call upon the full authority of the state to enforce its exclusivity; and

18) wholesale providers of water services are under no comparable requirements, and in fact have no service territories at all; they serve contractual customers, not an "area."

The overly-simplistic interpretation of TWC § 13.001 offered by TCMUD 12 ignores the reality of how wholesale water contracts come into being and the differences between wholesale service and retail service. The CCN-created monopoly is the reason that the state steps in to regulate such a monopoly as a substitution for competition. The regulatory authority, be it the Commission or a municipality exercising its original jurisdiction, must approve retail rate increases before they go into effect. No such prior approval is required for wholesale rates, even those charged by entities that might also fit within the definition of "retail public utilities."

When the Public Interest Rule was initially adopted by the TNRCC, the Preamble made it very clear that there is a bright-line difference between non-competitive retail utilities and contractually-based wholesale utilities:

> As is explained in the Water Code, the Legislature imposed a comprehensive regulatory system upon retail water and sewer utilities which are by definition monopolies in the areas they serve, and that the regulatory system is intended to serve as a substitute for competition. This system calls for rates based on the seller's cost of providing service. *The circumstances of wholesale water and sewer service are not the same.* The disputes concerning wholesale rates which have come before the commission concern parties who are in a position quite different than the typical retail customer. The purchaser is itself a utility that is sophisticated in utility transactions, and the purchaser, generally, has had several options from which it may obtain water or sewer service, including self service.[154]

One must not forget that it is a CCN that creates a monopoly by awarding an exclusive service area to the holder thereof. Retail public utilities without exclusive service areas are not monopolies; they have no state-sanctioned exclusivity or monopoly, and cannot exclude other providers from any geographic area. The WTCPUA, in its provision of wholesale water treatment services, for which it does not hold a CCN, does not operate as a monopoly. It is clear that one cannot simply refer to the definitions in the Texas Water Code, or to § 13.001(b)(1), to determine whether the WTCPUA exercises monopoly powers. Instead, one must examine the facts and apply commonly-accepted criteria to the facts, as discussed by WTCPUA witness Baudino in his testimony. Baudino's discussion and his conclusions are discussed in great detail in WTCPUA's Initial Brief at 12-36.

IX. EVIDENCE DOES NOT SHOW THAT THE PROTESTED RATES ADVERSELY AFFECT THE PUBLIC INTEREST

TCMUD 12 has wholly failed to carry its burden of proof that the Protested Rates are adverse to the public interest under 16 TAC § 24.133(a)(3)(A) or (C). Neither does the evidence

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[154] WTCPUA Ex. 76 at 6228, first column (emphasis added).

demonstrate that WTCPUA is a monopoly or exercises monopolistic power over TCMUD 12 in the provision of wholesale water treatment services. TCMUD 12's Exceptions restate the arguments and evidence that the ALJ has already considered, and appropriately rejected.

The Protested Rates, adopted by the Board of Directors of WTCPUA on November 21, 2013, are consistent with the terms and methodologies established under the 2009 Agreement. TCMUD 12 admittedly had "extensive negotiations" with the LCRA leading up to the 2009 Agreement, and chose at that time to forego constructing its own water treatment facilities. Upon its selection by TCMUD 12, the LCRA became the sole-source provider of wholesale water treatment services to TCMUD 12. Later, TCMUD 12 successfully negotiated additional benefits, through its attorney, in consideration for providing its consent for LCRA to assign all of its rights and obligations under the 2009 Agreement to the WTCPUA.

The 2009 Agreement and the 2012 Amendment demonstrate that the WTCPUA (and LCRA before it) did not, and does not, have a monopoly over the provision of wholesale water treatment services to TCMUD 12, and that WTCPUA does not have disparate bargaining power over TCMUD 12. Rather, TCMUD 12 has disparate bargaining power over WTCPUA because, as found by the PFD and as supported by the record: (1) TCMUD 12 had alternative wholesale water treatment service providers available; (2) the LCRA/WTCPUA needed a customer in 2009; and (3) the 2009 Agreement significantly restricted the ability of WTCPUA to change the rates, required the WTCPUA to have capacity available to provide wholesale water treatment services available to TCMUD 12, as needed, and provided to TCMUD 12 a guaranteed right to capacity in the System.

Further, the WTCPUA's decisions to create a Wholesale Customer Committee, hold six Committee meetings in 2013 to gain input from its customers, and incorporate those suggestions in the Protested Rates, as noted by the PFD, also do not demonstrate an abuse of alleged monopoly power. The additional benefit offered to TCMUD 12 reflected in the WTCPUA's decision to let its wholesale customers consider amending their reserved capacities and build-out

schedules under their contracts in 2013-2014 is not evidence of an abuse of alleged monopoly power.

As to the Protested Rates, TCMUD 12's claims focus solely on irrelevant cost *allocation* issues, not the revenue requirement or rate methodology. Clearly, it is TCMUD 12's goal to erase the bright line established in 16 TAC § 24.133(b) and in precedent that the public interest determination may *not* be based upon an analysis of the seller's cost of service.

The PFD correctly concluded that the computation of the revenue requirement and rate used for the Prior Rates did not change with the Protested Rates. Furthermore, the Protested Rates, which are lower than any rate TCMUD 12 has ever paid for wholesale water treatment services (even when TCMUD 12 did not have any customers), do not demonstrate an abuse of alleged monopoly power. That fact alone should be sufficient grounds to dismiss TCMUD 12's Petition, and to find that the Protested Rates are not adverse to the public interest.

X. TRANSCRIPTION COSTS

WTCPUA supported and did not take exception to this Section of the PFD, and given that no other party has taken exception to this Section, WTCPUA does not offer a response.

XI. RECOMMENDATION

WHEREFORE, PREMISES CONSIDERED, West Travis County Public Utility Agency respectfully requests that Commissioners of the Public Utility Commission adopt the Findings of Fact, Conclusions of Law, and Ordering provisions of the Administrative Law Judge's Proposal for Decision in this matter, denying the Petition and granting West Travis County Public Utility Agency such other and further relief to which it may be entitled.

XII. FINDINGS OF FACT

For the reasons provided in this Response, the Commissioners of the Public Utility Commission should adopt the ALJ's Findings of Fact that accompany the PFD and reject TCMUD 12's proposed Findings of Fact that accompany its Exceptions.

XIII. CONCLUSIONS OF LAW

For the reasons provided in this Response, the Commissioners of the Public Utility Commission should adopt the ALJ's Conclusions of Law that accompany the PFD and reject TCMUD 12's proposed Findings of Fact that accompany its Exceptions.

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ATTORNEYS FOR WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by e-mail, fax, hand-delivery and/or regular, first class mail on this 22nd day of October, 2015, to the parties of record.

DAVID J. KLEIN