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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

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PUBLIC UTILITY COMMISSION
FILING CLERK

OF TEXAS

**COMMISSION STAFF'S REPLY TO THE EXCEPTIONS TO THE PROPOSAL FOR
DECISION**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest and files this Reply to the exceptions to the Proposal for Decision raised by Travis County Municipal Utility District No. 12. In support thereof, Staff would show the following:

INTRODUCTION

On September 30, 2015, the State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) in the above-referenced docket.¹ On October 1, 2015, Commission Advising and Docket Management (CADM) filed a letter notifying parties that exceptions to the PFD are due October 15, 2015 and replies to exceptions to the PFD are due October 22, 2015. Therefore, this pleading is timely filed.

STAFF'S REPLY TO THE EXCEPTIONS TO THE PFD AND PROPOSED ORDER

Subject to Staff's filed exceptions to the PFD² Staff otherwise supports the PFD's recommendation that Travis County Municipal Utility District No. 12's (TCMUD12) petition appealing wholesale rates (Protested Rates) implemented by West Travis County Public Utility

¹ Proposal for Decision (Sep. 30, 2015). (PFD)

² Commission Staff's Amended Exceptions to the PFD (Oct. 15, 2015). (Staff's Exceptions)

Agency (WTCPUA) and affiliated parties be dismissed with prejudice to refile. TCMUD12's exceptions contain arguments that have been previously raised and rejected through the course of this proceeding. Therefore, the exceptions to the PFD raised by TCMUD12, other than those noted by Staff below, should be rejected.

I. INTRODUCTION

Staff agrees with the ALJ's interpretation of this section as stated in the PFD.

II. PARTIES

Staff agrees with TCMUD12's statement that WTCPUA is retail public utility as defined by Tex. Water Code § 13.002(19).³

III. PROCEDURAL HISTORY

TCMUD12 does not except to this section of the PFD.⁴

IV. BACKGROUND

TCMUD12 does not except to this section of the PFD.⁵

V. JURISDICTION

TCMUD12 asserts that the ALJ erred in addressing the existence of jurisdiction under Tex. Water Code § 12.013 because the issue had not been fully briefed.⁶ However, as the ALJ had not ruled on whether jurisdiction existed pursuant to Tex. Water Code § 12.013 prior to the hearing on the merits,⁷ the issue is still outstanding and the parties had the opportunity to include arguments regarding this section during briefing. Staff briefed this issue, arguing that jurisdiction over the matter pursuant to that section is improper because Tex. Water Code § 12.013 applies to rates charged for the *furnishing* of raw or treated water.⁸ WTCPUA is a retail public utility because it provides water service by transporting treated water to TCMUD12; however, it does not furnish raw or treated water because it simply transfers treated water that originates from LCRA.⁹

³ TCMUD12's Exceptions to the Proposal for Decision at 7-8 (Oct. 15, 2015). (TCMUD12's Exceptions).

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.*

⁷ SOAH Order No. 1 at 1 (Jun. 12, 2014).

⁸ Commission Staff's Initial Brief at 7-8 (Jun. 26, 2015).

⁹ *Id.* at 8.

Therefore, the ALJ had full discretion to rule on this jurisdiction issue, and Staff supports the ALJ's ruling as stated in the PFD.

VI. BURDEN OF PROOF

TCMUD12 does not except to this section of the PFD.¹⁰

VII. THE PUBLIC INTEREST DETERMINATION

A. Requirement for an Initial Public Interest Determination

Staff agrees with TCMUD12 that the Protested Rates at issue in this proceeding arise pursuant to a contract and, as such, TCMUD12 has the burden to prove that the Protested Rates adversely affect the public interest.¹¹

B. Determining Whether Public Interest is Adversely Affected

TCMUD12 alleges that the ALJ erred by applying extreme interpretations to the Commission's Public Interest Rule at 16 TAC § 24.133.¹² Staff supports the ALJ's interpretation of the Public Interest Rule. Specifically, the ALJ correctly determined that the cost of service prohibition should be interpreted broadly to exclude any analysis of the cost of providing service.¹³ The Preamble to the Public Interest Rule clearly demonstrates that the Legislature intended to give the Commission limited oversight to rates set pursuant to a contract and to only conduct a full rate review when the contested rates unmistakably violate the public interest.¹⁴ The ALJ's broad interpretation of the Public Interest Rule as a high burden to overcome is therefore not unreasonable or erroneous, and his determination that the public interest has not been violated based on this broad interpretation is justified.

VIII. ALLEGED ABUSE OF MONOPOLY POWER

TCMUD12 argues at length that WTCPUA is a monopoly and, as such, has abused its monopoly power. However, the ALJ's determination that WTCPUA did not abuse its monopoly power is correct based on the evidence..

A. Bargaining Power of the Parties

¹⁰ TCMUD12's Exceptions at 8.

¹¹ *Id.*

¹² *Id.* at 10.

¹³ PFD at 42.

¹⁴ *See id.* at 41.

TCMUD12 lists multiple factors to show that WTCPUA abused its monopoly power.¹⁵ TCMUD12's arguments that WTCPUA abused its monopoly power seem to arise solely from its prior assertion that WTCPUA is a monopoly; however, the presence of a monopoly does not in and of itself prove that the entity has abused such monopoly.

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

TCMUD12 takes exception to the ALJ's determination that it had alternative means of obtaining all or part of its wholesale water service. However, the ALJ is correct that TCMUD12 had at least one alternative option for service and that it had options for reducing its reserved water treatment capacity.

a. TCMUD12 is Free to Seek an Alternative

While TCMUD12 continues to allege that it had no other reasonable alternative to obtain wholesale water services either at the time of the LCRA Service Agreement or Transfer Agreement,¹⁶ the ALJ correctly determined that TCMUD12 had at least one other option for service: to construct its own facilities.¹⁷ Even though TCMUD12 continually asserted that this option was, and continues to be cost-prohibitive,¹⁸ TCMUD12 did not meet its burden to show that this was the case. Additionally, the ALJ determined that TCMUD12 continues to have the option to reduce the quantity of water service it receives from WTCPUA.¹⁹ TCMUD12 argues that, had it chosen to exercise this option, it may have not been able to request additional capacity in the future as the area grows.²⁰ However, this does not negate the fact that TCMUD12 may be able to obtain at least some of its wholesale water service from alternative sources, even if those sources are not able to provide the entirety of TCMUD12's requested capacity.

b. Treatment Capacity Needed

TCMUD12 alleges that it is "one of the fastest growing developments in Travis County"²¹ and, as such, could not feasibly reduce its reserved water treatment capacity and still meet the

¹⁵ TCMUD12's Exceptions at 19.

¹⁶ *Id.* at 21-23

¹⁷ PFD at 23.

¹⁸ TCMUD12's Exceptions at 27-29.

¹⁹ PFD at 12.

²⁰ TCMUD12 Exceptions at 23.

²¹ Rebuttal Testimony of Joseph DiQuinzio, TCMUD12 Ex. 4 at 8.

area's growing needs.²² As the ALJ points out, however, TCMUD12 is unsure as to how quickly the area will be built out.²³ As such, the ALJ is correct in concluding that TCMUD12 has not proved that replacing all or part of its reserved treatment capacity was not a viable alternative.²⁴

c. Available Alternatives

TCMUD12 asserts that the ALJ "improperly fails to consider the uncontestable fact that TCMUD12 did not have at any time since 2009 and still does not have an existing water system that would allow it to abandon the WTCPUA system and obtain the potable water that is necessary to serve its retail customers from another serve [sic] - including itself."²⁵ TCMUD12 proceeds to argue that financial restrictions prohibit it from constructing its own system and that no other viable alternatives exist. While the ALJ concluded that receiving treatment service from LMUD and HCMUD is not feasible, the fact remains that TCMUD12 provided no credible support for its estimated cost to build its own system and is legally free to do so.²⁶ Therefore, TCMUD12 has not proved that receiving service from WTCPUA is TCMUD12's only feasible option for service.

d. Costs of Alternatives

While TCMUD12 argues that it was improper for the ALJ to not rely on TCMUD12 witness Joseph DiQuinzio's estimate that it would cost approximately \$25,250,000²⁷ to construct its own system because he determined it to be "unreliably high,"²⁸ even though TCMUD12 acknowledges that this was only an estimate, and a high-end one at that.²⁹ TCMUD12's further alleged that this conclusion was improper because the ALJ could not have made this determination while simultaneously rejecting WTCPUA's estimate as unreliable;³⁰ however, it must be noted that the burden falls on TCMUD12, not WTCPUA, to prove that the estimated cost to construct its own facility is or is not feasible. Because TCMUD12 failed to provide sufficient evidence,

²² TCMUD12's Exceptions at 24.

²³ PFD at 15.

²⁴ *Id.* at 15.

²⁵ TCMUD12's Exceptions at 24.

²⁶ PFD at 16.

²⁷ TCMUD12 Ex. 1 at 5.

²⁸ PFD at 22.

²⁹ TCMUD12 Ex. 4 at 7

³⁰ TCMUD12's Exceptions at 28-29.

other than an unsubstantiated estimate, to prove that constructing its own facility was cost-prohibitive, the ALJ reasonably did not err in determining such.

2. Other Bargaining Power Factors

a. Connection Fee in Prior Rates

The ALJ properly concluded that the 2012 change to the connection fee is not at issue in this proceeding.³¹ Additionally, TCMUD12 explicitly acknowledges that it did not protest that change in rates.³²

b. Option to Amend Contract

TCMUD12 maintains its argument that the offer from WTCPUA to amend TCMUD12's wholesale services agreement to reduce its reserved treatment capacity was not a feasible option and did not affect the unequal bargaining power of the parties and further asserts that this offer was a vehicle to introduce WTCPUA's allegedly new methodology used to set the Protested Rates.³³ However, as stated above, the ALJ correctly determined that reducing its reserved treatment capacity would render TCMUD12 incapable of meeting its current and near-future demand. Additionally, the fact that TCMUD12 had the option to amend its contract but chose not to do so shows that TCMUD12 did not have disparate bargaining power and simply made a business decision that it determined was in its best interest.

c. Input Before Protested Rates Implemented

In response to this section of the PFD, TCMUD12 chooses to "incorporate by reference" the relevant arguments included in its Initial Brief.³⁴ Staff is aware that the parties' briefs are part of the evidentiary record of this proceeding and, for the reasons argued in Staff's prior briefs, agrees that the ALJ correctly determined that TCMUD12 had "a meaningful opportunity to provide input" prior to the adoption of the Protested Rates.³⁵

d. WTCPUA's Risk of Losing TCMUD12 as a Customer

The ALJ agreed with WTCPUA that, because LCRA and later WTCPUA had excess capacity, the potential loss of TCMUD12 as a paying wholesale customer gave TCMUD12

³¹ PFD at 24-25.

³² TCMUD12's Exceptions at 29.

³³ *Id.* at 30.

³⁴ *Id.* at 31.

³⁵ PFD at 27.

significant bargaining power.³⁶ TCMUD12 attempts to rebut this conclusion by arguing that WTCPUA does not need the revenue generated from TCMUD12; additionally, TCMUD12 asserts that, if this were the case, WTCPUA would not have offered TCMUD12 the option to reduce its maximum requested capacity.³⁷ However, this argument is flawed because it does not negate the fact that TCMUD12 had bargaining power within its arrangement with WTCPUA. If anything, the fact that WTCPUA offered to allow TCMUD12 to lower its requested capacity and therefore its financial obligation shows that WTCPUA was interested in retaining TCMUD12 as a customer and took action in order to do so, which is not characteristic of an entity who holds disparate bargaining power over another.

e. ALJ's Conclusion Concerning Disparate Bargaining Power

The evidence provided in this proceeding shows that TCMUD12 had the option to amend its contract and still has the option to do so, exercised its opportunity to provide meaningful input prior to the contested rate change, and held significant bargaining power in its service arrangement with LCRA and now WTCPUA. Ultimately, TCMUD12 has not provided any evidence sufficient to show that WTCPUA held or exercised disparate bargaining power. As such, the ALJ's conclusion that WTCPUA did not exercise disparate bargaining power is reasonable and should be affirmed.

B. Methodologies for Computation of Revenue Requirement and Rates

TCMUD12 alleges that the ALJ erroneously adopts a broad interpretation of the Public Interest Rule while simultaneously narrowly interpreting the meaning of methodology within that rule.³⁸ These interpretations, however, are not unreasonable and instead lead to the ultimate result the Legislature intended when enacting such a framework. TCMUD12 acknowledged that both the Protested Rates and Prior Rates were calculated using the cash-needs methodology; therefore, the existence of other methodologies has no bearing on determining whether the methodology had changed. TCMUD12 is correct in stating that the ALJ failed to give weight to TCMUD12 witness Jay Joyce's opinion that changes to the allocations within the methodologies constitutes changes

³⁶ PFD at 27.

³⁷ TCMUD12's Exceptions at 31.

³⁸ *Id.* at 34.

to the methodologies themselves.³⁹ This is due to the fact that the ALJ correctly determined that examining changes in allocations constitutes an analysis of the cost of service,⁴⁰ which is expressly prohibited by the Public Interest Rule.

1. Alleged Change in Revenue-requirement Computation Methodology

TCMUD12 maintains its argument that WTCPUA changed the methodology used to calculate its revenue requirement. However, TCMUD12 failed to provide any additional information to support this claim; as such, the ALJ's determination as explained in the PFD should be affirmed.

2. Computation Methodology and Cost-of-Service Analysis

TCMUD12 argues that, because the Preamble to the Public Interest Rule does not explicitly say that examining the allocations constitutes an analysis of the cost of service;⁴¹ however, this argument ignores the fact that the language of the Preamble does contain language granting great deference to rates set pursuant to written contracts in the absence of clear evidence showing that the rates are adverse to the public interest.

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

In its exceptions to the PFD, TCMUD12 argues extensively that WTCPUA changed the methodology used to calculate its revenue requirement.⁴² However, these arguments are based on its continued reliance on what clearly constitutes an analysis of the cost of service, as well as a one-time informal statement by a WTCPUA consultant. Ultimately, TCMUD12 has not provided

³⁹ TCMUD12's Exceptions at 39.

⁴⁰ PFD at 38.

⁴¹ TCMUD12's Exceptions at 41.

⁴² *Id.* at 34-47.

persuasive evidence to show that the revenue requirement methodology was changed without relying on evidence that is expressly prohibited from use in the public interest phase of an appeal.

4. Alleged Changes in Rate Computation Methodology

TCMUD12 maintains its argument that WTCPUA changed the methodology used to calculate its rates. However, TCMUD12 failed to provide any additional information to support this claim; as such, the ALJ's determination as explained in the PFD should be affirmed.

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

As explained by the ALJ, no party disputes the fact that a change in rate structure would reflect a change in methodology used to compute the rates.⁴³ WTCPUA used the same rate structure in both the Prior Rates and the Protested Rates. While it is possible that the methodology could have changed without being reflected in the rate structure, TCMUD12 has not proved that has happened in this case. The only proof toward this assertion consists of Mr. Joyce's analysis of the underlying allocations, which constitute cost of service evidence not permitted in a public interest determination. As such, the ALJ's conclusion that it does not find that the rate computation methodology has changed is reasonable and should be affirmed.

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

In its exceptions to the PFD, TCMUD12 repeats its prior arguments as to why WTCPUA constitutes a monopoly.⁴⁴ The ALJ rejects these arguments based on his conclusions that TCMUD12 is not prohibited, legally or otherwise, from constructing its own facility to provide treated water service and that TCMUD12 has not proved that constructing its own treatment facility was cost-prohibitive.⁴⁵ Based on the evidence present during the pendency of the proceeding, the ALJ's conclusion is reasonable. However, even if TCMUD12 is effectively operating as a monopoly, it does not automatically follow that it has abused any monopoly power it may have. TCMUD12 actively participated in the negotiations regarding the LCRA Service Agreement and the Transfer Agreement with WTCPUA. WTCPUA gave TCMUD12 the option to amend its contract in order to lower its costs, an option which WTCPUA freely rejected.

⁴³ PFD at 44.

⁴⁴ TCMUD12's Exceptions at 11-19.

⁴⁵ PFD at 49.

TCMUD12 failed to provide sufficient and admissible evidence to show that WTCPUA changed the methodology used to calculate either its revenue requirement or the Protested Rates. As such, the ALJ correctly concluded that TCMUD12 held significant bargaining power and that WTCPUA therefore did not abuse monopoly power.

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

As explained above, the ALJ found that the Protested Rates did not adversely affect the public interest because TCMUD12 has not met its burden to prove that WTCPUA exercised disparate bargaining power over TCMUD12 that WTCPUA changed its methodology used to calculate its revenue requirement or Protested Rates, or that WTCPUA abused monopoly power if it did so exist.⁴⁶ However, one fact which heavily weighs in favor of this determination is that the Protested Rates are actually lower than the Prior Rates. As such, the ALJ's determination should be affirmed.

X. TRANSCRIPTION COSTS

TCMUD12 does not except to this portion of the PFD.⁴⁷

XI. RECOMMENDATION

TCMUD12 failed to provide any additional information in its exceptions to the PFD sufficient to show that the ALJ's conclusions are not correct. Because TCMUD12 as the petitioner carries the burden of proof in this proceeding, and because TCMUD12 has failed to show that the Protested Rates adversely affect the public interest, the Commission should approve the ALJ's recommendation that the petition be dismissed with prejudice.

XII. FINDINGS OF FACT

TCMUD12's recommended amendment to Finding of Fact 13 to clarify that WTCPUA is a retail public utility should be approved. TCMUD12's remaining proposed changes to the ALJ's findings of fact should be rejected as arising from flawed and incorrect arguments. However, Staff

⁴⁶ *Id.* at 51.

⁴⁷ *Id.* at 53.

maintains its argument for the modification of Finding of Fact 68 as described in its Exceptions to the PFD.⁴⁸

XIII. CONCLUSIONS OF LAW

TCMUD12's recommended amendment to Conclusion of Law 1 to clarify that WTCPUA is a retail public utility should be approved. TCMUD12's remaining proposed changes to the ALJ's conclusions of law should be rejected as arising from flawed and incorrect arguments. However, Staff maintains its argument for the inclusion of a conclusion of law as described in its Exceptions to the PFD⁴⁹ and further recommends that the remaining conclusions of law be renumbered accordingly.

CONCLUSION

Staff respectfully requests that the Commission reject TCMUD12's exceptions to the PFD with the exception of the modifications to Finding of Fact 13 and Conclusion of Law 1 described herein, and adopt the PFD subject to the modifications to Finding of Fact 68 and the addition of a new conclusion of law as requested in Staff's Exceptions to the PFD.

⁴⁸ Staff's Exceptions at 1-2.

⁴⁹ *Id.* at 2.

DATE: October 22, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on this the 22nd day of October, 2015 in accordance with 16 TAC § 22.74.

Jessica Gray w/permission
Jessica A. Gray, Attorney *K. Hubbard*