Control Number: 42866

Item Number: 188

Addendum StartPage: 0

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

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 PUBLIC UTILITY COMMISSION OF TEXAS**

WEST TRAVIS COUNTY PUBLIC UTILITY AGENCY'S RESPONSE TO TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 12'S MOTION FOR REHEARING

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TO: THE HONORABLE CHAIRMAN AND COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION

COMES NOW, West Travis County Public Utility Agency ("WTCPUA") and files this Response to Travis County Municipal Utility District No. 12's ("TCMUD 12") Motion for Rehearing, in accordance with the Texas Administrative Procedure Act[1] and Public Utility Commission ("Commission") Rule 16 Texas Administrative Code ("TAC") § 22.264.

I. INTRODUCTION

TCMUD 12's Motion for Rehearing in this matter should be denied because the Findings of Fact, Conclusions of Law, and Ordering Provisions of the Commission's Order ("Final Order"), dated November 20, 2015, are supported by substantial evidence in the record.

On March 6, 2014, TCMUD 12 filed its petition ("Petition") to appeal the wholesale water treatment rates adopted by the Board of Directors of the WTCPUA on November 21, 2013 ("Protested Rates") and charged to TCMUD 12 pursuant to a certain Wholesale Water Services Agreement Between Lower Colorado River Authority ("LCRA") and TCMUD 12 ("2009 Agreement") as amended by the Agreement regarding Transfer of Operations of the West Travis

[1] Tex. Gov't Code §§ 2001.001-.902 (West 2013).

County System from the LCRA to the WTCPUA ("2012 Amendment") for diverting, treating, and delivering TCMUD 12's raw water supply ("wholesale water treatment services").[2] Accordingly, the Petition is subject to 16 TAC Chapter 24, Subchapter I, and because the Protested Rates are charged pursuant to a written contract, a contested case hearing on the public interest was properly held under 16 TAC § 24.133. Although there are numerous factors that could be considered under 16 TAC § 24.133(a), the issues at bar were limited to §§ 24.133(a)(3)(A) and 24.133(a)(3)(C).[3]

WTCPUA, the City of Bee Cave ("Bee Cave"), Hays County, West Travis County Municipal Utility District No. 5 ("WTCMUD No. 5") (Bee Cave, Hays County, and WTCMUD No. 5 are collectively, the "Participating Entities") and Commission Staff all opposed the Petition and recommended denial of the Petition.[4] On September 30, 2015, the Administrative Law Judge ("ALJ") issued his Proposal for Decision ("PFD"), agreeing with WTCPUA, the Participating Entities, and Commission Staff, and recommending denial of the Petition. Then, at its open meeting on November 19, 2015, the Commission unanimously decided to deny the Petition, as memorialized in the Final Order.

TCMUD 12's Motion for Rehearing unconvincingly reasserts its prior arguments in this matter. As discussed in more detail herein, the Commission's Final Order is supported by the evidence in the record and is consistent with the Texas Constitution's deference to written contracts, Texas Water Code ("TWC") § 13.043(f) and the Commission's Public Interest Rule, 16 TAC § 24.133.

II. REPLY TO POINT OF ERROR NUMBER ONE

In its Point of Error No. 1, TCMUD 12 incorrectly asserts the Commission erred in refusing to agree with TCMUD 12's overly-simplistic and unreasonable application of Texas

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[2] Direct Testimony of Donald G. Rauschuber, P.E., WTCPUA Ex. 1 at 67 (Attachment G) and at 103 (Attachment J).

[3] *See* Order No. 13 (Mar. 25, 2015) (granting in part WTCPUA's Motion for Partial Summary Decision under 16 TAC § 22.182(a)).

[4] WTCPUA Ex. 1; Direct Testimony of Heidi Graham, Commission Staff Ex. 1 at 7-13; Initial Brief of West Travis County Public Utility Agency (June 26, 2015) (WTCPUA's Initial Brief); Closing Argument of Bee Cave; Initial Brief of Hays County; Initial Brief of WTCMUD No. 5; Commission Staff's Initial Brief (June 26, 2015) (Staff's Initial Brief).

Water Code definitions. The Commission's Findings of Fact and Conclusions of Law are not in error, are supported by substantial evidence, and should not be changed.[5]

The WTCPUA does not provide retail water utility services to TCMUD 12, nor to any of the ultimate consumers of potable water service within TCMUD 12, a fact that is not mentioned in TCMUD 12's Motion, yet is fatal to its claim of error. The one definition that TCMUD 12 fails to cite in its Motion is that of "retail water or sewer utility service," which is defined as "potable water service or sewer service, or both, provided by a retail public utility *to the ultimate consumer* for compensation."[6] The ultimate consumers of the wholesale water treatment services sold by WTCPUA to TCMUD 12 are TCMUD 12's retail customers. This very simple distinction between wholesale service and retail service should be enough to deny TCMUD 12's Motion.

The arguments in TCMUD 12's Motion are not new, but have been previously considered and rejected by both the ALJ and the Commission. TCMUD 12 remains unable to offer a cogent argument that a wholesaler, in its provision of wholesale services, must be regulated as a retailer, and must therefore be presumed to be a monopolist. Such a conclusion has never been adopted by any of the administrative agencies tasked with the 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.[7]

TCMUD 12 asserts that the WTCPUA is a retail public utility and therefore a monopoly, without providing any reasoning or basis for this statement other than references to TWC

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[5] In its Motion, TCMUD 12 challenges in Point of Error No. 1, Findings of Fact Nos. 13, 15-18; Conclusions of Law Nos. 1, 11, and 12; Ordering Paragraph 1; and the Final Order at 2. These findings and conclusions, and the Order itself, are supported by the record and the law, and are not in error.

[6] Texas Water Code Ann. § 13.002(20) (West 2008 & Supp. 2014) ("TWC") (emphasis added).

[7] TCMUD 12's insistence that the Commission should impose the same regulatory restrictions and oversights on the WTCPUA as a wholesale provider of services is a continuation of its advocacy at the hearing on the merits, where it repeatedly stated that: (1) this regulatory process should "achieve a competitive outcome" in the same manner that regulatory oversight operates for electric utilities, and (2) the Commission should serve as a substitute for competition and should "set rates" for wholesale providers. *See* Tr. at 307 and 313 (Zarnikau Recross and Further Redirect) (Apr. 22, 2015). As noted in WTPUA's Initial Brief, these arguments illustrate an astounding disregard for the parameters of the Commission's authorized review of wholesale water rates that have been set by contract. *See* WTCPUA's Initial Brief at 36-39.

§ 13.002(19), which includes in the definition of "retail public utilities" those entities providing potable water service for compensation, and to TWC § 13.001(b)(1), which states that "retail public utilities are by definition monopolies in the areas they serve."[8] However, it is improper and illogical to conclude that wholesale water treatment services provided under contract are the same as retail water utility services provided to an exclusive service area pursuant to a water or sewer certificate of convenience and necessity ("CCN"). TCMUD 12 would have the Commission conclude that it must impose retail rate regulatory provisions on contractual rates, which would be a wholly erroneous result.

The imposition of a comprehensive regulatory scheme over *retail* water utility service as a substitution for competition, as noted in TWC § 13.001(b)(3), is accomplished *both* by the rate regulations *and* the exclusive service territory provisions in Chapter 13. Importantly, this comprehensive regulatory scheme does not apply to *wholesale* water service providers, and thus the regulatory provisions of Chapter 13 of the Texas Water Code are not applied to the provision of *wholesale* water treatment services. If that were to be the case, then there would be no reason for separately and independently dealing with appeals of rates charged under wholesale water contracts in 16 TAC Chapter 24, Subchapter I. In addition, the courts would not have so 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.[9]

More specifically, if a wholesaler who also happens to be a retail public utility is a monopoly "by definition," there would be no point in instituting the public interest criteria found in 16 TAC § 24.133. If wholesale providers are by definition monopolies, with exclusive service areas and captive customers, then there is 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 likewise no point in examining the purchaser's alternative means if, by definition, a monopoly already exists.[10]

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[8] Staff's Initial Brief at 11.

[9] *High Plains Nat. Gas Co. v. R.R. Comm'n of Tex.*, 467 S.W.2d 532 (Tex. Civ. App.—Austin 1971, writ ref'd, n.r.e.); *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332 (Tex. App.—Austin 1994, writ denied).

[10] 16 TAC § 24.133(a)(3)(A).

This overly-simplistic interpretation of TWC § 13.001 ignores the reality of how wholesale water contracts are developed and the differences between wholesale service and retail service.[11] If an entity intends to provide retail water services, unless it is specifically exempted by law from the water CCN requirements, it must obtain a CCN from the Commission in order to do so.[12] Because a water CCN is a grant of monopoly status in a specific area (hence the "by definition" phrase in TWC § 13.001(b)(1)), 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.[13] 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.

It is the award of a water CCN by the Commission that 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. 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.[14] The mapping of retail water service areas is highly detailed and meticulous. 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.[15] Wholesale providers of water services are

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[11] Travis County Municipal Utility District No. 12's Initial Brief at 26 (June 26, 2015) (TCMUD 12's Initial Brief). The illogical nature of the position regarding the classification of the WTCPUA as a retail public utility in its provision of wholesale services is amply illustrated by TCMUD 12 witness Zarnikau's confused inability to explain the import of the classification, and his conclusion that it really means not much at all. Tr. at 229:10-231:23 (Zarnikau Cross) (Apr. 21, 2015).

[12] TWC §§ 13.242 and 13.243.

[13] TWC § 13.241(a).

[14] TWC § 13.244; 16 TAC § 24.105 (Contents of CCN Applications).

[15] TWC § 13.252 authorizes the Commission to issue a cease and desist order prohibiting the construction or extension of a line, plant, or system, or the provision of service, if the Commission determines that such construction or provision of service interferes with a retail public utility that has been granted, or that is not required to possess, a CCN.

under no comparable requirements, and in fact have no service territories at all; they serve contractual customers, not an "area."

The list of dichotomies between the regulatory framework for the "presumed" retail monopolies as contrasted to a wholesale contractual provider is lengthy, but the most important points are provided below:[16]

- TWC § 13.002(20) defines retail water utility service as the provision of potable water service by a retail public utility to the *ultimate consumer*. TCMUD 12 is not the ultimate consumer of the services provided by WTCPUA; there is no retail relationship between these two entities.

- *Retail* water utility services are provided to an exclusive service area pursuant to a water or sewer CCN; wholesale water treatment services are provided under contract.

- A comprehensive regulatory scheme over retail water utility service is provided as a substitution for competition (TWC § 13.001(b)(3)), and is accomplished both by the rate regulations and the exclusive service territory provisions in Chapter 13. The regulatory authority, be it the Commission or a municipality exercising its original jurisdiction, must approve retail rate increases before they go into effect.[17] 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."

- WTCPUA's wholesale contractual rates are not regulated; appeals of rates charged under wholesale water contracts are separate and independent from review of rates charged by retail public utilities.

When the wholesale contracted rate review rules were initially adopted by the Texas Natural Resource Conservation Commission, 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

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[16] These considerations were discussed in greater detail in West Travis County Public Utility Agency's Response to the Initial Briefs and Closing Arguments at 18-19 (Aug. 3, 2015) (WTCPUA's Reply Brief).

[17] Effective September 1, 2015, utilities with fewer than 500 connections (Class C utilities), may obtain automatic rate adjustments pursuant to TWC § 13.1872, but every five years they must return to the regulatory authority for rate increase approvals.

> for competition. This system calls for rates based on the seller's cost of 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.[18]

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 has been done by the ALJ in the PFD, and by the Commission in its Final Order.

The Commission committed no error when it declined to address in this proceeding whether the WTCPUA is a retail public utility.[19] If the Commission had undertaken such an exercise, its finding on the question would have been irrelevant, and would not have affected any of the Findings of Fact or Conclusions of Law challenged by TCMUD 12 in this Point of Error. Nor would such a finding change the fact that TCMUD 12 failed to meet its burden of proving that the protested rates are adverse to the public interest.[20] The Commission has not erred and has not prejudiced TCMUD 12's substantial rights.

III. REPLY TO POINT OF ERROR NUMBER TWO

TCMUD 12's Point of Error No. 2 wrongly claims that the Commission erred in concluding that the WTCPUA did not change its rate methodology for computing its revenue requirement when it adopted the Protested Rates. The Commission's Findings of Fact, Conclusions of Law, and Ordering Provision cited by TCMUD 12 in Point of Error No. 2 are not in error, are supported by substantial evidence, and should remain unchanged.[21]

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[18] WTCPUA Ex. 76 at 6228, first column.

[19] Order at 2 (Nov. 20, 2015).

[20] 16 TAC § 24.136; Conclusion of Law No. 2.

[21] In its Point of Error No. 2, TCMUD 12 focuses on Findings of Fact Nos. 21, 38, 53, 62-65 and 70A; Conclusions of Law Nos. 6, 7, and 10-13; and Ordering Provision 1.

The record contains *uncontroverted* evidence that the WTCPUA utilized the cash needs methodology to determine its revenue requirement in the Protested Rates as well as in its previously adopted rates, adopted on November 15, 2012 (the "Prior Rates").[22] TCMUD 12's Motion for Rehearing does not dispute those dispositive and critical facts, and such facts remain fatal to its Petition. Since TCMUD 12 cannot overcome these key facts, it instead analyzes WTCPUA's cost of service, which is expressly prohibited by 16 TAC § 24.133(b).[23] The prefiled and live testimony of the expert witnesses for WTCPUA, TCMUD 12, and the Commission all support the conclusion that the cash needs basis method was used to compute the revenue requirement for both the Prior Rates and the Protested Rates.[24] The Commission was, therefore, correct in concluding that the WTCPUA's revenue requirement methodology did not change. The record supports no other conclusion.

Nevertheless, TCMUD 12's Point of Error No. 2 continues to misconstrue fact and law, as well as the reasonable conclusions reached by the Commission that no change in revenue requirement methodology occurred. In Point of Error No. 2, TCMUD 12 first mistakenly claims that the Commission erred in finding that there are only two "approaches for establishing a utility's revenue requirement: the cash-needs approach and the utility-basis approach,"[25] and that this finding led to the Commission's ultimate finding that the WTCPUA used the same methodology for computing the revenue requirement in the Prior Rates and Protested Rates. However, Finding of Fact No. 63 contains no such statement; rather, it actually provides that the American Water Works Association ("AWWA") *M1 Manual* states "that there are two *generally accepted* approaches for establishing a utility's revenue requirement: the cash-needs approach and the utility-basis approach."[26]

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[22] Direct Testimony of Jack E. Stowe, WTCPUA Ex. 3 at 11-15, 17:1-23 and at 200-202 (Attachment F); 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.

[23] *See* 16 TAC § 24.133(b) (stating "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.")

[24] *See* footnote 22, *supra*.

[25] TCMUD 12's Motion for Rehearing at 5 (Dec. 15, 2015).

[26] Order at Finding of Fact No. 63.

Additionally, TCMUD 12 uses convoluted logic to argue that because "cash or utility basis" is found in 16 TAC § 24.135(b) but not in 16 TAC § 24.133(a)(3)(C), the Commission somehow cannot find that these are two accepted methods for determining the revenue requirement. TCMUD 12 argues that the Commission has interpreted these rules in a way that limits a finding of a violation of the Public Interest Rule to only those situations in which the seller changes between a cash basis and a utility basis, which, it implies, would render the public interest test meaningless. However, such claim conveniently ignores the fact that the cash needs methodology is universally recognized in the industry and the rules as a legitimate method for determining a seller's revenue requirement,[27] and experts on all sides of this case agree that the WTCPUA has consistently used the cash needs methodology to determine its revenue requirement.[28] TCMUD 12's claim also mistakenly overlooks the fact that 16 TAC § 24.133(a)(3)(C) is only one of many factors that the Commission may weigh in determining whether a protested rate evidences the seller's abuse of monopoly power, which itself is just one factor in determining if a protested rate adversely affects the public interest.[29]

TCMUD 12 mentions that the fact that a seller changing its revenue requirement methodology from cash needs to a utility basis would be "highly unusual" as somehow supporting the idea that the Commission should have a more expansive interpretation of what constitutes a change in a revenue requirement methodology. However, the fact that such a change would be "highly unusual" is presumably why such a change could lead to (but not directly evidence) an abuse of monopoly power.

In the end, all of these arguments are intended to distract from the fact that TCMUD 12 has not met its burden of showing that the WTCPUA used a methodology other than the cash needs basis to determine its revenue requirement for the Protested Rates. Again, 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 case that the WTCPUA used the

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[27] WTCPUA Ex. 3 at 10.

[28] WTCPUA Ex. 3 at 9, 11-13, 15 and at 43-49 (Attachment C); Staff Ex. 1 at 9-10; Tr. at 199:14-18 (Joyce Cross) (Apr. 21, 2015).

[29] 16 TAC § 24.133(a).

cash basis in computing the Protested Rates and Prior Rates. The revenue requirement methodology did not change, and the Commission did not err in reaching this conclusion.

Next, TCMUD 12's contention that a change in revenue requirement methodology is reflected in the contract amendment offered to TCMUD 12 by the WTCPUA, which TCMUD 12 refused, was appropriately rejected by the Commission. Such contention inappropriately concentrates on changes in allocations, which, again, fall within a cost of service examination that is not permitted in this proceeding under 16 TAC § 24.133(b). Specifically, this argument is based solely on alleged changes of how WTCPUA allocated its costs to its customers and customer classes. The record is full of evidence, repeatedly highlighted by WTCPUA in its Closing Arguments and Reply to Exceptions, that examining the allocation of costs by a seller to its buyers is an analysis of the seller's cost of service,[30] and the Proposal for Decision and Final Order recognized and acted on this critical distinction.[31]

Contrary to TCMUD 12's contention, excluding evidence concerning WTCPUA's cost of service analysis is not an "expansive interpretation" of 16 TAC § 24.133. Rather, it is an accurate interpretation of 16 TAC § 24.133(b), which prohibits the Commission from determining whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service, and for good reason. As the Preamble for the Public Interest Rule concludes, a seller's cost of service is not a reliable mechanism for the public interest test due to the subjective nature of the examination.[32] This is in contrast to an analysis of revenue requirement methodology, which is a fairly objective analysis. The Preamble makes clear that the purpose of the bifurcated process and the public interest criteria are generally to give deference to negotiated contracts and to second-guess the legitimacy of the contract only when there has been a clear violation of the public interest.[33] The fact that TCMUD 12 has failed to meet its burden of proof in this matter does not mean that the Public Interest Rule serves no

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[30] WTCPUA's Initial Brief at 68-71; WTCPUA's Response to Exceptions to the Proposal for Decision at 33-37 (Oct. 22, 2015) (WTCPUA's Reply to Exceptions); WTCPUA's Reply Brief at 7 and 43-45.

[31] Order at Finding of Fact No. 62; Proposal for Decision at 31-42 (Sept. 30, 2015) (Sections VIII.B.2 and VIII.B.3).

[32] *See* WTCPUA's Initial Brief at 65; WTCPUA Ex. 76.

[33] *See* WTCPUA Ex. 76 at 6228.

purpose, as claimed by TCMUD 12. The Commission's agreement with the ALJ's interpretations of the Rule are consistent with the stated intent of the bifurcated approach to wholesale rate appeals in the Preamble to the Public Interest Rule, which is to "identify frivolous appeals and more efficiently process legitimate ones."[34] As shown below, the Preamble clearly memorializes the desire that the 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.[35]

Lastly, TCMUD 12 argues that the Commission erred in accepting the ALJ's dismissal of statements by WTCPUA representatives that TCMUD 12 claims show the WTCPUA changed the computation methodology for the revenue requirement and the rates in setting the Protested Rates. Such attempts have been previously rejected by the ALJ and Commission, and should be rejected again. TCMUD 12 has made several attempts to insert individual casual references to methodology, outside of a deposition or sworn testimony in a contested case hearing, as proof that the WTCPUA changed its revenue requirement methodology despite the substantial evidence that shows otherwise. While individuals may be casual in their use of words on a day-

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[34] WTCPUA Ex. 76 at 6227-6228.

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

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. Plus, as the WTCPUA noted in its Reply Brief, each of TCMUD 12's references are to cost allocation methods and should not be interpreted to relate to a revenue requirement or rate methodology.[36] For example, the term "wholesale rate methodology" when used by WTCPUA in the resolution approving the form contract amendment[37] 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.[38] The Commission's agreement with the ALJ on this matter is entirely reasonable and appropriate.

For these reasons, the portions of the Commission's Final Order cited by TCMUD 12 in this Point of Error are correct, are supported by the record, and have not prejudiced TCMUD 12's substantial rights.

IV. REPLY TO POINT OF ERROR NUMBER THREE

TCMUD 12's Point of Error No. 3 incorrectly asserts that the Commission erred in concluding that the WTCPUA did not change its methodology for computing its rates when it adopted the Protested Rates. The Commission's Findings of Fact, Conclusions of Law, and Ordering Provision cited by TCMUD 12 in Point of Error No. 3 are not in error and should remain unchanged.[39]

In Point of Error No. 3, TCMUD 12 acknowledges that both the Prior Rates and Protested Rates consist of a Monthly Charge and flat Volume Rate, and this undeniable, uncontroverted fact[40] wholly undermines TCMUD 12's claims in this Point of Error. To find otherwise would defy logic. First, TCMUD 12's claim hinges on the fact that since Finding of

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[36] WTCPUA's Reply Brief at 56-57.

[37] WTCPUA Ex. 1 at 209 (Attachment Q).

[38] WTCPUA's Reply to Exceptions at 38-39.

[39] In its Point of Error No. 3, TCMUD 12 focuses on Findings of Fact Nos. 21, 38, 67-70 and 71; Conclusions of Law Nos. 8, and 10-13; and Ordering Provision 1.

[40] Tr. at 168:21-169:8 (Joyce Cross) (Apr. 21, 2015); WTCPUA Ex. 3 at 17:1-23; WTCPUA's Reply Brief at 83 (Attachment A).

Fact No. 68A provides examples of other volumetric rate structures, the absence of a similar findings concerning a monthly charge somehow means that there was no way for the Commission to conclude that the rate structure had changed because "water utilities always charge customers a monthly charge, usually to recover fixed costs, and a volume charge, usually to recover variable costs." This claim is meritless for at least the following reasons: (i) Finding of Fact No. 71 is supported by the record;[41] (ii) examples of changes in rate methodology are not necessary findings of fact;[42] and (iii) the WTCPUA is not a "utility" as defined in the Texas Water Code[43] and (iv) WTCPUA's provision of wholesale water treatment services to TCMUD 12 is not providing potable water to the public or for the resale of potable water to the public (retail water service).[44] TCMUD 12 has never provided any credible evidence that the WTCPUA actually changed its rate structure.

Second, TCMUD 12 points to the different volumetric rates for different wholesale customers as providing proof of a change in rate methodology. However, such contention is solely based upon cost allocation arguments – or said another way – an analysis of the WTCPUA's costs of service that is expressly excluded by 16 TAC § 24.133(b). The ALJ and Commission have been correct in rejecting these arguments as prohibited cost of service analyses; the portions of the Commission's Final Order cited by TCMUD 12 in this point of error are correct and supported by the record, and have not prejudiced TCMUD 12's substantial rights.

V. REPLY TO POINT OF ERROR NUMBER FOUR

In its Point of Error No. 4, TCMUD 12 incorrectly asserts the Commission erred in finding that neither WTCPUA nor the LCRA had disparate bargaining power over TCMUD 12.

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[41] *Id.*; WTCPUA's Reply Brief at 59-60.

[42] A simple example of a change to the Monthly Charge is to not have a monthly charge at all and instead only change a volumetric rate.

[43] A water "utility" is defined in Texas Water Code § 13.002 as "any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use . . . ."

[44] WTCPUA Ex. 1 at 67-92 (Attachment G).

The Commission's findings of fact and conclusions of law are not in error, are supported by substantial evidence and the law, and should not be changed.[45]

TCMUD 12 initially makes much ado about the Order's alleged failure to accurately describe the "wholesale water services" obtained by TCMUD 12 under the Wholesale Water Services Agreement.[46] The precise nature of this alleged "error" is not made clear by TCMUD 12. What is clear, however, is that the PFD is very accurate in its description of such services, to-wit: ". . . LCRA agreed to divert, transport, and treat, as needed, the raw water that TCMUD 12 had purchased from LCRA under the Raw Water Contract and to deliver that treated water to TCMUD 12 at a specified delivery point."[47] TCMUD 12 is apparently complaining of the PFD's and Order's summary of the panoply of services provided by the LCRA and the WTCPUA. Such a summary does not amount to any error on the part of the Commission; the record is complete and without ambiguity.

Although it has included Finding of Fact No. 32 in its list of alleged errors, TCMUD 12 provides no argument or citation that supports any claimed error in this finding, to wit: that Districts 11, 12, and 13 have statutory authority to construct and operate water treatment facilities (TWC § 54.201(b)).

The second claimed error under this Point of Error No. 4 amounts to nothing more than a complaint that the Commission failed to shift the burden from TCMUD 12 to the WTCPUA in proving whether TCMUD 12 had alternatives to initially contracting with the LCRA and later to consenting to the assignment of such contract to the WTCPUA.[48] Contrary to TCMUD 12's claim that its evidence was "un-contradicted," the fact is that TCMUD 12 was unable to rebut the evidence presented by WTCPUA on the availability of self-service as an option. The evidence presented by WTCPUA to rebut TCMUD 12's argument that self-service was unavailable was summarized in WTCPUA's responsive brief:

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[45] In its Motion, TCMUD 12 challenges in Point of Error No. 4, Findings of Fact Nos. 32-34, a "portion" of 35, 36-50, 55-57, 61, 72, 73; Conclusions of Law Nos. 9, 11, 12, 13; and Ordering Paragraph 1. These findings and conclusions, and the Order itself, are supported by the record and the law, and are not in error.

[46] TCMUD 12's Motion for Rehearing at 12.

[47] Proposal for Decision at 4-5.

[48] TCMUD 12's Motion for Rehearing at 12-13.

- As a municipal utility district, TCMUD 12 has the authority to construct and operate water treatment facilities under Texas Water Code Chapters 49 and 54;

- TCMUD 12 does not need 3.98 mgd of wholesale water treatment services today- it only needs a small fraction of such amount (the 2009 Agreement is intended to serve 2,125 LUEs at full build-out, but in 2009 TCMUD 12 had zero LUEs, and in 2014 TCMUD 12 only had 132 LUEs);[49]

- TCMUD 12 acknowledged that such water treatment infrastructure can be phased in as TCMUD 12 continues to grow[50] (which can be done by one entity completely, by multiple entities, or temporarily by one entity and then replaced with another entity);

- TCMUD 12 is geographically located along the shores of Lake Travis, in close proximity to its authorized raw water diversion point, with undeveloped land where water treatment infrastructure could be built;[51]

- Lakeway MUD, Hurst Creek MUD, TCMUD 11, and Lakeway Rough Hollow South Community, Inc., have almost 3 mgd of capacity in their raw water barge, pumps, and pipelines to divert and transport TCMUD 12's raw water out of Lake Travis for treatment;[52]

- TCMUD 12 and Rough Hollow Development, Ltd. had entered into a Utility Construction Agreement, whereby Rough Hollow Development, Ltd. agreed to provide advances to the District 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; and[53]

- TCMUD 12 did not provide any evidence that there were legal or regulatory hurdles to construct its own facilities or work with other alternative providers, in whole or in part; and TCMUD 12 did not provide any evidence of issues arising by commingling its raw water supply with TCMUD 11's raw water supply that is treated by Lakeway MUD.

Another instance in which TCMUD 12 failed to meet its burden of proof is its attempts to show that the costs of self-serving were unreasonable. TCMUD 12 provided no 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 alternative provider or from itself. The only evidence provided by TCMUD 12 was unsupported, non-expert testimony from

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[49] WTCPUA Exs. 43 and 44; Tr. at 605:4-6 (DiQuinzio ReCross) (Apr. 23, 2015).

[50] Tr. at 68:6-18 (DiQuinzio Cross) (Apr. 21, 2015).

[51] Direct Testimony of Joseph A. DiQuinzio, Jr., TCMUD 12 Ex. 1 at 85 (JAD Exhibit 2 at 23).

[52] WTCPUA Ex. 81 at 2.

[53] WTCPUA Ex. 70 at 1-7.

its manager, Joe DiQuinzio, prepared two days before DiQuinzio's prefiled testimony was filed, which was ultimately refuted by the WTCPUA's capital improvements plan.[54]

There is no requirement in the Commission's alternatives analysis in 16 TAC § 24.133(a)(3)(A) that the rates charged by the alternative provider must be cheaper than (or even reasonably close to) the rates that are being challenged. TCMUD 12 failed to provide any evidence as to what TCMUD 12's rates would need to be to recover its costs of building its own infrastructure.

TCMUD 12 willfully ignored the necessity of reviewing the parties' status in 2009 when the 2009 Agreement was originally executed by TCMUD 12 and the LCRA, and fails to substantiate its claim that an analysis of such status amounts to arbitrary and capricious action. The record contains the expert testimony of Richard Baudino to the effect that the circumstances under which the 2009 Agreement was developed are vitally important to the issue of monopoly status of the provider of the services. As Mr. Baudino testified, this historical background *and the very language of the agreement* establish that the TCMUD 12 had alternative sources and it had bargaining power with the LCRA.[55] TCMUD 12 voluntarily established the contractual relationship under which the parties operated since 2009, and under which it had historically enjoyed several rate decreases. The myopic approach espoused by the TCMUD 12 – to ignore its deliberate and well-informed decision to enter into the agreement and to negotiate the terms under which the agreement would be assigned to the WTCPUA – is insupportable and would fail to consider the totality of all of the pertinent facts.

The 2009 Agreement does not bar TCMUD 12 from self-serving. TCMUD 12 cites a provision (Sec. 3.01.b.) from the Wholesale Water Services Agreement in an attempt to support its argument that TCMUD 12 had to obtain all of its wholesale water services from WTCPUA, and thus WTCPUA had disparate bargaining power and is a monopoly.[56] TCMUD 12 ignores the fact, fully developed in the record, that when offered the opportunity to reduce its reliance on the WTCPUA for services (i.e., reduce the quantity of Wholesale Water Treatment Services to

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[54] Tr. at 66-67 (Apr. 21, 2015); WTCPUA Ex. 1 at 29:7-31:10 and Attachment V at 269-270.

[55] Direct Testimony of Richard A. Baudino, WTCPUA Ex. 2 at 7, 12.

[56] TCMUD 12's Motion for Rehearing at 14.

be purchased from the WTCPUA), TCMUD 12 declined the offer.[57] TCMUD 12 failed to show how its voluntary actions translate to abusive actions on the part of the WTCPUA.

The ALJ did not undertake a "hind-sight prudence analysis" as alleged by TCMUD 12.[58] TCMUD 12 continues to argue for its interpretation of the record, but its Motion fails to show that the Commission's Order is not supported by substantial evidence. In fact, the Commission did not commit error in adopting the ALJ's recommendation that the WTCPUA did not exercise disparately greater bargaining power, did not abuse any monopoly power, and did not adopt rates that are adverse to the public interest.

For these reasons, the portions of the Commission's Final Order cited by TCMUD 12 in this Point of Error are correct, are supported by the record, and have not prejudiced TCMUD 12's substantial rights.

VI. REPLY TO POINT OF ERROR NUMBER FIVE

In its Point of Error No. 5, TCMUD 12 wrongly argues that the Commission erred in finding that the WTCPUA did not abuse any alleged monopoly power. The Commission's Findings of Fact, Conclusions of Law, and Ordering Provision cited by TCMUD 12 in Point of Error No. 5 are not in error and should remain unchanged.[59] TCMUD 12 argues that the Commission came to the erroneous conclusion because the Commission based its conclusions on the fact that the Protested Rate was lower than the Prior Rate. TCMUD 12 also believes the Commission erred in not allowing speculative evidence stricken by the ALJ into the record. As discussed in more detail, herein, both of these claims are merely restatements of its case and are meritless, as previously determined by the ALJ in his PFD and the Commission in its Final Order.

Contrary to TCMUD 12's first claim, the Final Order contains Findings of Fact, fully supported by the evidence in the record, that provide a sound basis for the Conclusions of Law and Ordering Provision that WTCPUA did not abuse any alleged monopoly power in adopting

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[57] Tr. at 339-40 (Baudino Cross) (Apr. 22, 2015).

[58] TCMUD 12's Motion for Rehearing at 16.

[59] In its Point of Error No. 5, TCMUD 12 focuses on Findings of Fact Nos. 21, 38, 74-76; Conclusions of Law Nos. 11-13; and Ordering Provision 1.

the Protested Rates. As recognized by the ALJ and Commission, the record demonstrates that it is uncontroverted amongst the parties that the Protested Rates are lower than the Prior Rates, as well as the rates that LCRA and TCMUD 12 initially agreed to when they entered into the 2009 Agreement – despite an increase in the number of TCMUD 12 customers during the timeframe of 2009-2013.[60] It is far-fetched to interpret such a rate change as abusive behavior. Regardless, the fact that the rates were lowered was one of several facts in the record that enable the Commission to conclude that WTCPUA did not abuse any alleged monopoly power over TCMUD 12.

TCMUD 12's argument that the consideration of lowered rates is not supported by statute, rule, or precedent misses the mark. The raising or lowering of rates is *evidence* of the lack of abuse rather than a *criterion* for concluding that monopoly power has been abused. The language of 16 TAC § 24.133(a)(3) is illustrative of this last point: a criterion for determining whether the public interest has been violated can be shown if "the *protested rate evidences* the seller's abuse of monopoly power . . . ."[61] The rule does not list all types of evidence that may be used to show that the criterion has or has not been met. TCMUD 12 has conflated evidence and criteria without providing real evidence supporting any of its claims.

Regardless, there are other Findings of Fact in the Final Order that also support the conclusion that WTCPUA's Protested Rates do not evidence any abuse of any alleged monopoly power. First, Findings of Fact Nos. 37-40 detail that the WTCPUA provided TCMUD 12 with an opportunity to reduce the quantity of wholesale water treatment services it could receive from WTCPUA. Second, Finding of Fact No. 51 memorializes that the WTCPUA held 6 meetings with its wholesale customers (including TCMUD 12) to obtain their input on the WTCPUA's allocation of its costs regarding its rates.[62] Third, Finding of Fact No. 52 contains the important finding that WTCPUA representatives met with TCMUD 12 representatives, in addition to the wholesale customer committee, to discuss the Protested Rates.

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[60] *See* Finding of Fact No. 43 (containing a chart listing the quantity of TCMUD 12 customers, year over year).

[61] Emphasis added.

[62] Proposal for Decision at 26.

The second argument TCMUD 12 makes under Point of Error No. 5 is that the Commission fails "to apply the statutory definition of 'rate' to the facts of this case." In addition to failing to cite or provide the definition of the term "rate," TCMUD 12 never explains how the Commission failed to "apply the statutory definition," and instead jumps into additional conclusory statements about a change in methodology and evidence (which it has not provided) of the WTCPUA's disparately greater bargaining power.[63]

Third, the ALJ's decision to strike three lines of Mr. DiQuinzio's rebuttal testimony hypothesizing about subsequent rate changes as speculative was appropriate,[64] and the Commission's Final Order reflects that accurate decision. The struck testimony clearly speculated as to the impact and basis of the rates and methodologies that the WTCPUA Board of Directors *may* employ after adopting the Protested Rates. It is obvious that under 16 TAC § 24.133(a)(3)(C) the protested rate and the previously adopted rate must be compared in order to determine whether there has been a change in methodology. Here, however, TCMUD 12 is hypothesizing as to the reasons for the change in subsequent rates, and thus, is speculating (and the evidence is not germane to this matter). If TCMUD 12 desires to file another petition of a subsequent WTCPUA rate change, it certainly has the ability to do so.

For these reasons, the portions of the Commission's Final Order cited by TCMUD 12 in this Point of Error are correct, are supported by the record, and have not prejudiced TCMUD 12's substantial rights.

VII. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, West Travis County Public Utility Agency respectfully requests that the Commission deny Travis County Municipal Utility District No. 12's Motion for Rehearing, and that it be granted such other and further relief to which it may be entitled.

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[63] This confusing second argument appears to be a step to TCMUD 12's third argument that the Commission's failure to overrule the ALJ's evidentiary ruling striking the prefiled rebuttal testimony of Mr. DiQuinzio (TCMUD 12 Ex. 4 at 17, lines 6-8) as speculative led to the erroneous conclusion that the WTCPUA's rates do not violate the public interest. This issue is addressed, *infra*.

[64] Order No. 16 at 4 (Apr. 17, 2015).

Respectfully submitted,

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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 30th day of December, 2015, to the parties of record.

DAVID J. KLEIN