



Control Number: 43934



Item Number: 9

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83<sup>rd</sup>  
Legislature, Regular Session, transferred the functions  
relating to the economic regulation of water and sewer  
utilities from the TCEQ to the PUC effective  
September 1, 2014

Bryan W. Shaw, Ph.D, *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



43934

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
*Protecting Texas by Reducing and Preventing Pollution*

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September 9, 2011

TO: All Persons on Mailing List

RE: **SOAH Docket No. 582-09-3549; TCEQ Docket No. 2009-0372-UCR.**  
Application for a Water Rate/Tariff Change for **Wiedenfeld Water Works, Inc.**  
Certificate of Convenience and Necessity No. 12052, in **Kerr, Kendall, and Medina**  
**Counties, Texas**

The above-referenced matter is scheduled to be considered by the Texas Commission on Environmental Quality on **September 21, 2011** at **9:30 A.M.** in Room 201S, Building E, 12100 Park 35 Circle, Austin, Texas.

Pursuant to 30 TAC § 80.263, oral presentations before the commission shall be limited to five minutes each, excluding time for answering questions, unless the chairman or general counsel establishes other limitations.

Sincerely,

A handwritten signature in cursive script that reads "Bridget C. Bohac".

Bridget C. Bohac  
Chief Clerk

BCB/mc

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

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SOAH Docket No. 582-09-3549  
TCEQ Docket No. 2009-0372-UCR

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

WATER RATE/TARIFF CHANGE §  
APPLICATION OF WIEDENFELD §  
WATER WORKS, INC., §  
CERTIFICATE OF CONVENIENCE §  
AND NECESSITY NO. 12052, IN §  
KERR, KENDALL, AND MEDINA §  
COUNTIES, TEXAS, §  
APPLICATION NO. 36172-R §

BEFORE THE TEXAS

CHIEF CLERKS OFFICE

COMMISSION ON

ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE PROPOSAL  
FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), by and through a representative of the Commission's Environmental Law Division, files the following reply to exceptions to the Administrative Law Judge's (ALJ's) proposal for decision (PFD). In support of his exceptions, the ED shows the following:

**I. INTRODUCTION**

This reply responds to statements made by Wiedenfeld in its exceptions to the PFD. To facilitate the discussion, any headings used refer to specific headings found in Wiedenfeld's exceptions. Although the ED's recommendation as detailed in his closing argument and exceptions has not changed, the ED offers the following based on the evidentiary record in this case to respond to Wiedenfeld's arguments.

**II. REPLY TO WIEDENFELD'S EXCEPTIONS**

**A. Amending the application**

Wiedenfeld argued that its application should have been evaluated based on the amendments it made to the application in its prefiled testimony.<sup>1</sup> The ED believes that Wiedenfeld did not properly amend its application and argued the following in his

<sup>1</sup> Wiedenfeld's Exceptions to the PFD 2, 4 (Oct. 21, 2010).

closing argument in support of that position:

Under title 30, section 291.25(g) of the Texas Administrative Code, a rate application may be modified on a showing of good cause. In his prefiled testimony, R. Charles Wiedenfeld, owner and president of Wiedenfeld, stated that he was making multiple revisions to Wiedenfeld's application, including a change to the requested rates.<sup>2</sup> The problem with these revisions is that Wiedenfeld never sought a finding of good cause for them from either the ED before the case was referred to SOAH or from the ALJ after it was referred. Therefore, Wiedenfeld's application has not been officially revised, and the September 12, 2008, application is the version of the application at issue in this case.

While section 291.25(g) does not explicitly state that an applicant must apply to the ED or the ALJ to be able to amend its application, any other reading of the rule would render it ineffective. When an applicant amends its application after filing, it potentially deprives the other parties of an opportunity to audit the utility's records, seek discovery responses, and provide direct testimony regarding those changes. Furthermore, such unhindered changes result in the other parties never being sure exactly which application they need to seek information for, analyze, and respond to, forcing them to redo their analyses every time the applicant makes another change. Section 291.25(g) requires an applicant to make a showing of good cause to prevent the applicant from amending its application at will. The fact that the applicant must make a *showing*

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<sup>2</sup> *E.g.*, Ex. WWW-2, at 28:11-18 (recategorize pressure tanks), 34:6-7 (amended invested capital), 45:20-46:5 (new requested rates).

implies that it must be shown to someone. If the ED or ALJ does not make this finding, then how would anyone know that the applicant has made a showing of good cause? The other parties would not know exactly which numbers are at issue in the case and would be deprived of the chance to seek additional information regarding those proposed changes or argue that the changes should not be permitted.

Even if the ALJ believes that Wiedenfeld could amend its application through its prefiled testimony, there is some confusion regarding what revisions Wiedenfeld was attempting to make. As Leila C. Guerrero-Gantioqui, TCEQ auditor and ED expert witness in this case, pointed out in her testimony, there are multiple discrepancies between the numbers found in Mr. Wiedenfeld's testimony and Schedule C of that testimony.<sup>3</sup> Under this scenario, at the closing argument stage of this case, the other parties still would not know which numbers they need to analyze and discuss. Surely this is the type of situation section 291.25(g) attempts to avoid. Therefore, the ED continues to assert that the September 2008 application is the applicable application, and it is the one the ED used to analyze Wiedenfeld's proposed rate changes.<sup>4</sup>

The inconsistency between Mr. Wiedenfeld's testimony and the revised application pages attached to that testimony was not the only issue regarding the revised numbers themselves. As the ALJ pointed out in her PFD, Wiedenfeld did not provide any supporting documentation for its revisions.<sup>5</sup> Wiedenfeld argues that supporting

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<sup>3</sup> Ex. ED-1, at 4:15-5:7.

<sup>4</sup> ED's Closing Argument 7-8 (June 29, 2010).

<sup>5</sup> PFD 6 (Oct. 1, 2010).

documentation should be requested during discovery,<sup>6</sup> but Wiedenfeld did not make its application revisions until after the discovery period had ended.<sup>7</sup> Wiedenfeld's view that it did not need to provide support for its revisions is also contrary to the TCEQ's continued position that the numbers in the rate application must be supported with sufficient supporting documentation, a position the ED discussed in his closing argument and exceptions to the PFD.<sup>8</sup> Wiedenfeld failed to provide such documentation for its revisions, giving the Commission even more reason to reject those changes and base its analysis on the original application.

The fact that no party in this case objected to the testimony in question is irrelevant and does not negate the fact that Wiedenfeld did not follow the amendment procedure required by section 291.25(g). Even if the Commission still chose to consider the amendments, which amendments would it consider – the ones that Mr. Wiedenfeld stated in his testimony or the ones that were portrayed in Schedule C? Either way, the changes were not supported with sufficient supporting documentation. If such documentation had been provided during the audit and discovery phases of the case, staff would have incorporated that information into their calculations. As the ALJ stated, no supporting documentation was provided during the prefiled testimony or hearing phases.<sup>9</sup> Therefore, the application as originally filed is the application up for consideration in this case.

## **B. Water Code section 13.145 consolidated tariff**

According to Wiedenfeld, the ALJ was incorrect when she found that Wiedenfeld had not demonstrated that its systems are substantially similar in terms of cost of

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<sup>6</sup> Wiedenfeld's Exceptions to the PFD 3 (Oct. 21, 2010).

<sup>7</sup> Order No. 1, at 3 (July 7, 2009) (written discovery period ended on November 6, 2009); Order No. 5, at 1 (Jan. 11, 2010) (Wiedenfeld's prefiled testimony was due on February 4, 2010).

<sup>8</sup> ED's Closing Argument 10-12; ED's Exceptions to the PFD 2 (Oct. 21, 2010).

<sup>9</sup> PFD 5.

service.<sup>10</sup> Wiedenfeld provided little support for this contention. It repeatedly stated that the last Aqua Texas rate case should apply to this case but did not cite to any specific provisions from the Aqua Texas order to support its position let alone discuss exactly how the evidence it presented met the same requirements Aqua Texas had met.<sup>11</sup> Wiedenfeld dismissed the ALJ's and OPIC's comparison between Wiedenfeld and Double Diamond Utilities without providing any citations to the order for the last Double Diamond Utilities rate case.<sup>12</sup> The utility also attempted to shift the burden of proof for this issue to the other parties<sup>13</sup> when it is Wiedenfeld alone that carries that burden.<sup>14</sup>

The bottom line is that the ALJ found the evidence that Wiedenfeld presented on this issue to be lacking, stating "WWW proffered little persuasive evidence on the issue."<sup>15</sup> Wiedenfeld does not need yet another bite at the apple to try to prove its systems are substantially similar. It was allowed to supplement its testimony to provide information regarding its costs of service both prior to and at the hearing after failing to provide any evidence on the issue in its original prefiled testimony.<sup>16</sup> It also had multiple opportunities to make its argument regarding substantial similarity in its closing argument, reply to closing arguments, and exceptions to the PFD. Furthermore, even if the Commission found that the systems are substantially similar in terms of cost of service, Wiedenfeld has failed to show that it needs a rate increase to recover its revenue requirement.<sup>17</sup> Wiedenfeld simply has fallen short of meeting its burden of proof in this

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<sup>10</sup> Wiedenfeld's Exceptions to the PFD 4-7.

<sup>11</sup> *Id.* at 4-5, 7.

<sup>12</sup> *Id.* at 5-6 (Oct. 21, 2010).

<sup>13</sup> *Id.* at 7 (Oct. 21, 2010).

<sup>14</sup> 30 TEX. ADMIN. CODE § 291.12 (West 2010).

<sup>15</sup> PFD 15 (Oct. 1, 2010).

<sup>16</sup> Ex. WWW-2; Ex. WWW-5 Ex. 1; Transcript of Hearing 339:10-341:25 (May 6, 2010).

<sup>17</sup> PFD 42-43.



case, and its application should be denied.

### **III. CONCLUSION**

Wiedenfeld filed an application to amend its rates for twelve water systems. The ED analyzed that application based on the information provided by Wiedenfeld and the laws of the State of Texas. Based on his analysis, the ED found that Wiedenfeld had not shown that its systems were substantially similar in terms of cost of service and calculated rates that are below Wiedenfeld's current rates. Based on these findings, the ED recommended that Wiedenfeld's application be denied. Wiedenfeld did not show that its systems are substantially similar and did not provide sufficient supporting documentation for all the costs and expenses listed in its application. Therefore, the ED again requests that the Commission adopt the ALJ's proposed order with the ED's recommended changes presented in his exceptions to the PFD.

Respectfully submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

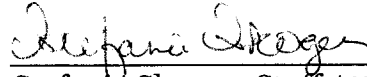
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**CERTIFICATE OF SERVICE**

I certify that on November 1, 2010, a copy of the foregoing document was sent by first class mail, agency mail, electronic mail, and/or facsimile to the persons on the attached mailing list.



Stefanie Skogen, Staff Attorney  
Environmental Law Division

**Mailing List**

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SOAH Docket No. 582-09-3549  
TCEQ Docket No. 2009-0372-UCR**

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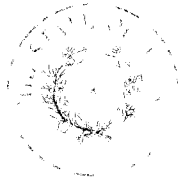
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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY



Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 21, 2010

CHIEF CLERKS OFFICE

2010 OCT 21 PM 4:08

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Water Rate/Tariff Change Application of Wiedenfeld Water Works, Inc.,  
Certificate of Convenience and Necessity No. 12052, in Kerr, Kendall, and  
Medina Counties; Application No. 36172-R; SOAH Docket No. 582-09-3549;  
TCEQ Docket No. 2009-0372-UCR

Dear Ms. Castañuela:

I have enclosed the Executive Director's Exceptions to the Proposal for Decision. Please  
let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "Stefanie Skogen", is located below the word "Sincerely,".

Stefanie Skogen  
Staff Attorney  
Environmental Law Division

Enclosure

cc: Mailing list



SOAH Docket No. 582-09-3549  
TCEQ Docket No. 2009-0372-UCR

2010 OCT 21 PM 4:08

WATER RATE/TARIFF CHANGE § BEFORE THE STATE OFFICE  
APPLICATION OF WIEDENFELD § CHIEF CLERKS OFFICE  
WATER WORKS, INC., §  
CERTIFICATE OF CONVENIENCE § OF  
AND NECESSITY NO. 12052, IN §  
KERR, KENDALL, AND MEDINA §  
COUNTIES, TEXAS, §  
APPLICATION NO. 36172-R § ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR  
DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), by and through a representative of the Commission's Environmental Law Division, files the following exceptions to the Administrative Law Judge's (ALJ's) proposal for decision (PFD). In support of his exceptions, the ED shows the following:

**I. OVERVIEW**

The ED fully supports the ALJ's conclusions that Wiedenfeld Water Works, Inc.'s (Wiedenfeld's) application for a water rate/tariff change should be denied, that refunds should be issued to Wiedenfeld's water customers for the period during which the proposed rates were collected, and that Wiedenfeld should be assessed the transcription costs. However, the ED's position differs from that of the ALJ regarding several of the findings of fact found in the proposed order, and he provides the following exceptions to those items. The ED is also providing several corrections to the proposed order.

**II. EXCEPTIONS**

**A. Finding of Fact Nos. 55-57**

Wiedenfeld has taken the position that \$8,164 in lab fees should be added to its

repairs, maintenance, and supplies expenses.<sup>1</sup> The ALJ has supported the addition of these fees because “[a] subheading in the general ledger is titled ‘Lab Fees’ with a list of dates, name, and amounts.”<sup>2</sup> The ED opposes adding these fees. He has repeatedly taken the position in contested rate cases that a general ledger entry alone is not sufficient supporting documentation for costs and expenses. As the ED stated in his closing argument,

While a general ledger is a useful business tool and provides the agency with a list of the utility’s expenses and assets, the ledger must be supported by verifiable proof, such as invoices and receipts, which show what each item is, how much it cost, who paid for it, and whether it is an expense or an asset. When a utility does not provide such support, the TCEQ may disallow the unsupported costs and expenses.<sup>3</sup> The ED has no choice other than to recommend that the rates be set based on the costs and expenses that could be verified. To do otherwise would potentially subject a utility’s customers to pay for costs and expenses that should not have been passed on to them.”<sup>4</sup>

The ED did not include these expenses in his calculations because he did not receive sufficient supporting documentation for them.<sup>5</sup> If the ED had received such documentation, he would have added the expenses into his calculations even though they were not included in the application. The ED took this same approach throughout the case, cutting costs and expenses that were unsupported and adding expenses that

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<sup>1</sup> Applicant’s Closing Argument 13 (June 29, 2010); Transcript of Hearing 175:15-18 (May 5, 2010).

<sup>2</sup> PFD 21 (Oct. 1, 2010).

<sup>3</sup> 30 TEX. ADMIN. CODE § 291.28(4) (West 2010).

<sup>4</sup> ED’s Closing Argument 2 (June 29, 2010).

<sup>5</sup> Transcript of Hearing 369:8-13 (May 6, 2010); ED’s Closing Argument 15 (June 29, 2010); ED’s Reply to Closing Arguments 5 (Aug. 6, 2010).

were not in the original application but for which ED staff received supporting documentation.<sup>6</sup> Because Wiedenfeld did not provide sufficient supporting documentation for the lab fees, they should not include in the revenue requirement. Therefore, the ED recommends removing Finding of Fact Nos. 55 and 56 and amending Finding of Fact No. 57 so the amount listed is \$49,043, the ED's calculated total,<sup>7</sup> rather than \$57,068.

### **III. CORRECTIONS**

The following discussions address various parts of the proposed order which need to be corrected due to factual errors.

#### **A. First paragraph and Finding of Fact No. 2**

Wiedenfeld currently has four tariffs:<sup>8</sup> one each for Oak Ridge Estates, Westwood, and Windwood Oaks and one for the remaining systems. Therefore, the word "tariff" on the third line of the first paragraph of the order should be plural, and the first sentence of Finding of Fact No. 2 should say "four tariffs" instead of "three tariffs."

#### **B. Finding of Fact No. 27**

For the first set of rates listed in this finding, Vista Hills should not be listed, as it is not affected by this rate change.<sup>9</sup> Heritage Park and Cedar Springs should be added to the list, as they are affected by the rate change.<sup>10</sup>

#### **C. Finding of Fact No. 35**

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<sup>6</sup> *E.g.*, ED's Closing Argument 15 (June 29, 2010) (describing how staff cut \$12,357 in unsupported expenses but added \$1,910 for vehicle expenses that were not included in the application).

<sup>7</sup> Ex. ED-1, at 10:15-16, att. LG-6.

<sup>8</sup> Transcript of Hearing 69:8-10 (May 5, 2010).

<sup>9</sup> Ex. ED-A 22.

<sup>10</sup> Ex. ED-A 22.



Wiedenfeld calculated a revenue requirement of \$481,169 in its application.<sup>11</sup> That number should replace the \$453,912 found in the second sentence of this finding.<sup>12</sup>

**D. Finding of Fact No. 50**

The ED subtracted \$950 for utility expenses attributable to the Vista Hills system.<sup>13</sup> That number should replace the \$885 found in this finding.

**E. Finding of Fact Nos. 55 and 56**

If the Commission chooses to not delete these findings, the dollar amount listed should be \$8,164 rather than \$8,025.<sup>14</sup>

**F. Finding of Fact No. 72**

The amount should be \$1,191, not \$1,291.<sup>15</sup>

**G. Finding of Fact Nos. 84 and 85**

The words “weighted average” should appear in front of “rate of return” in both findings, as these findings discuss Wiedenfeld’s calculated weighted average ROR, not its ROR, which was 10%.<sup>16</sup>

**H. Finding of Fact No. 91**

The amount for the weighted average ROR should be 8.41%, not 8.415%.<sup>17</sup>

**I. Conclusion of Law No. 38**

The rule listed should be section 80.23(d)(1), not 80.24(d)(1).

**IV. ADDITIONAL RECOMMENDATIONS**

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<sup>11</sup> Ex. ED-1 att. LG-1, at 14.

<sup>12</sup> Wiedenfeld did list \$453,912 as the revenue requirement in Table X.A of the application. Ex. ED-1 att. LG-1, at 18. However, the ED is unsure where that number came from; it may just be the amount of revenue Wiedenfeld believed its proposed rates would generate.

<sup>13</sup> The ED subtracted \$885 for electricity and \$65 for telephone and trash, which totals \$950. Ex. ED-1, at 9:21-10:1, att. LG-6.

<sup>14</sup> Ex. ED-1 att. LG-12, at 87.

<sup>15</sup> Ex. ED-1 att. LG-1, at 14.

<sup>16</sup> Ex. ED-1 att. LG-1, at 12.

<sup>17</sup> The non-rounded amount was 8.4104%. Ex. ED-1 att. LG-4.

Finding of Fact No. 13 is correct as stated. However, it does not discuss the fact that the ED ordered Wiedenfeld to retract the additional statement and that Wiedenfeld mailed the retraction to its customers on July 15, 2009.<sup>18</sup> Therefore, the ED recommends adding the following language at the end of this finding: The ED ordered Wiedenfeld to retract the additional statement. Wiedenfeld mailed the retraction to its customers on July 15, 2009.

If the Commission chooses to grant Wiedenfeld's requested conservation rates and miscellaneous fees, the ED believes language to that effect needs to be added to Ordering Provision No. 1 so it is part of what the Commission is actually ordering in this case. Therefore, the ED recommends adding the following language: Wiedenfeld's requested conservation rates for all twelve systems are approved. Wiedenfeld's requested tariff charge increases for its tap fee, reconnection fee (customer's request), transfer fee, and returned check charge for all twelve systems are also approved.

In Ordering Provision No. 3, the ALJ left the length of the refund period blank. The ED recommends that the Commission order Wiedenfeld to administer refunds over the number of months the amounts to be refunded were charge. As the length of time those amounts were collected for, it is appropriate to require that the over-collected amounts be refunded for the same time period. The ED has consistently recommended this method of determining the refund period in past rate cases, and the Commission has adopted this recommendation. The ED requests that the Commission adopt this methodology in this case as well.

## **V. CONCLUSION**

While the ED appreciates and fully supports the ALJ's recommendation that the

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<sup>18</sup> Ex. ED-E.

Commission deny Wiedenfeld's water rate application and order Wiedenfeld to issue refunds to its customers, the ED has concerns regarding some of the findings found in the proposed order and what their impact could be on future rate cases, not to mention the case at hand. Therefore, the ED respectfully requests that the Commission adopt the ALJ's proposed order with the ED's recommended changes presented herein.

Respectfully submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

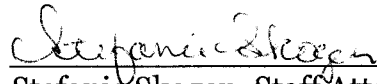
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**CERTIFICATE OF SERVICE**

I certify that on October 21, 2010, a copy of the foregoing document was sent by first class mail, agency mail, electronic mail, and/or facsimile to the persons on the attached mailing list.

  
Stefanie Skogen, Staff Attorney  
Environmental Law Division

**Mailing List**  
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**SOAH Docket No. 582-09-3549**  
**TCEQ Docket No. 2009-0372-UCR**

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APPLICATION FOR A WATER  
 RATE/TARIFF CHANGE OF  
 WIEDENFELD WATER WORKS,  
 INC., CERTIFICATE OF  
 CONVENIENCE AND  
 NECESSITY NO. 12052 IN  
 KERR, KENDALL, AND  
 MEDINA COUNTIES

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

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

COMES NOW, Wiedenfeld Water Works, Inc. (WWW) and files its Exceptions to the Proposal for Decision (PFD) of Administrative Law Judge (ALJ) Lilo Pomerleau on remand issues in the above referenced cause.

WWW concurs with the Exceptions on Remand Issues filed by the TCEQ Executive Director (ED). In the interest of brevity, those arguments will not be repeated but are adopted by reference on behalf of WWW.

WHEREFORE PREMISES CONSIDERED, WWW prays that the ALJ's PFD and proposed order be revised as set forth in the ED's exceptions.

Respectfully submitted,

By: 

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ATTORNEYS FOR WIEDENFELD WATER  
WORKS, INC.

#### CERTIFICATE OF SERVICE

I, Mark H. Zeppa, certify that the foregoing Exceptions on Remand Issues were efiled with the TCEQ Chief Clerk and the State Office of Administrative Hearings and emailed to all attorneys of record on August 15, 2011.

  
Mark H. Zeppa

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