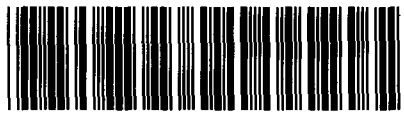

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SOAH DOCKET NO. 473-17-0119.WS
PUC DOCKET NO. 46245

APPLICATION OF DOUBLE	§	**BEFORE THE**
DIAMOND UTILITY COMPANY, INC.	§	**PUBLIC UTILITY COMMISSION**
FOR WATER AND SEWER	§	**OF TEXAS**
RATE/TARIFF CHANGE	§	

WHITE BLUFF RATEPAYERS GROUP'S RESPONSE TO DOUBLE DIAMOND UTILITY COMPANY, INC.'S MOTION FOR REHEARING

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, White Bluff Ratepayers Group ("WBRG") and files this Response to the Motion for Rehearing filed by Double Diamond Utility Company, Inc. ("Double Diamond"). Pursuant to 16 Tex. Admin. Code § 22.264(a) ("TAC") and Administrative Procedure Act, Tex. Gov't Code § 2001.146(b), this motion is timely filed.

INTRODUCTION

Double Diamond raises thirteen purported points of error in its motion for rehearing. In the interest of judicial economy, and to avoid covering ground already well-trampled in this case, WBRG will not respond to all thirteen points. This should not be taken as an indication that WBRG agrees with Double Diamond on the points that are not addressed in this response.

RESPONSE TO DOUBLE DIAMOND'S PURPORTED POINTS OF ERROR

The loudest complaint made by Double Diamond throughout its motion for rehearing is that the Commission was statutorily mandated to identify every flaw in Double Diamond's application and reject the application before the hearing on the merits, and that allowing Double Diamond to proceed through discovery and hearing was a violation of the Commission's legal obligation. Double Diamond is simply wrong.

Texas Water Code § 13.1871 (d) and (e) ("TWC"), the two statutory provisions on which Double Diamond relies for its contention, very clearly state that the Commission has the option, but not the obligation, to disallow unsupported costs or expenses, or to outright reject an incomplete application. Nowhere in this statute, nor anywhere else in the Texas Water Code or the Commission's rules, is the Commission required to reject an application that fails to provide

sufficient documentation. *See* TWC § 13.1871(d) ("If the utility fails to provide . . . documentation or other evidence . . . the regulatory authority may disallow the nonsupported costs or expenses.") (emphasis added); *id.* at § 13.1871(e) ("[I]f the application . . . is not substantially complete . . . it may be rejected . . . .") (emphasis added); 16 TAC § 24.8(b) ("If the commission determines that any deficiencies exist in an application . . . the application or filing may be rejected . . . .") (emphasis added). Double Diamond's assertion that the phrase "the Commission may" means "the Commission must" is misguided.

Additionally, Double Diamond erroneously contends that TWC § 13.1871(d) imposed a time limit upon Commission to reject the utility's application for failure to support costs or expenses. *See* Double Diamond Motion for Rehearing at 3 ("And now, after a reasonable time period allowed for the Commission to disallow costs or expenses has passed . . . ."). Double Diamond again misreads the law. Section 13.1871(d) clearly shows that the "reasonable time" limit refers to the amount of time a utility has to provide the necessary documentation or evidence supporting the application's costs or expenses, before the Commission may exercise its power to disallow them. This is not a time restriction placed on the Commission. The Commission's time limit upon receipt of an application is found in 16 TAC § 24.8(a): "Any application under chapter 24 . . . shall be reviewed for administrative completeness within 30 calendar days from the date the application is file-stamped by the commission's Central Records office." Double Diamond's application was filed on August 1, 2016, the Commission ordered review on August 4, 2016, and Commission Staff filed a recommendation on administrative completeness on September 1, 2016.

Ironically, at the outset of this case, one party called for the rejection of Double Diamond's application, or in the alternative a suspension of the effective date until Double Diamond filed a new application correcting the misrepresentations concerning developer contributions, among other things, in the pending application. That party was WBRG.[1] Double Diamond now complains that the Commission "arbitrarily disallow[ed]" nearly $4,300,000 of

[1] *See generally* White Bluff Ratepayers Group's Motion to Reject Application or Suspend Rates Based on Misrepresentations in the Application, Nov. 15, 2016; *id.* at 4–5 ("Rejection of the application would give DDU time to gather all of the necessary data and prepare and file a complete application. Rejection of the application would also allow DDU the opportunity to work with the ratepayers in coming to some agreement regarding rate base prior to the filing of the application. Alternatively, WBRG requests that the ALJ determine that DDU failed to properly complete the rate application, and suspend the rate, pursuant to Commission Substantive Rule 24.26(b) until such time as DDU submits a properly completed application.").

the utility's rate base, but the offer to come to agreement with WBRG regarding rate base has been on the table since the beginning.

Double Diamond Point of Error No. 1

Double Diamond Point of Error No. 1 claims there is no evidence to support the Commission's findings of fact regarding developer contributions. This is not a new argument, and there is plenteous evidence in the record to support the Commission's findings. The testimony of WBRG's expert witness,[2] Double Diamond's own testimony,[3] and Double Diamond's RFI responses[4] provided support for findings of fact 90A, 93, and 93A. Double Diamond attempts to place the burden on the Commission, when in fact the law requires the utility to carry the burden of proof regarding developer contributions. *See* TWC § 13.184(c).

Double Diamond Points of Error No. 2 & 3

Double Diamond Points of Error No. 2 and 3 claim in part that the Commission has invented a "novel" burden of proof in this docket and has shouldered the utility with the impossible task of producing documentary evidence that the utility made investments in rate base in order for such investments to be included in the calculation of the rate of return. But this is not a new requirement—long-standing PUC rules have always required a utility to prove its costs. *See* Proposal for Decision at 49 ("DDU is in the best position to access and discover the evidence necessary to differentiate between plant, equipment, and property contributed by the developer and that invested by DDU."); *id.* at 50 ("[T]he ALJ finds that DDU had the burden to show how much of the original cost of the utility assets included in its proposed rate base for White Bluff were contributed by the developer. The ALJ further finds that DDU failed to meet that burden.") (citing 1 TAC § 155.427 and TWC § 13.184(c)).

Double Diamond does indeed have a right to know what is expected of it in the administrative process. And the statute clearly explains that the utility must carry its burden to show that its proposed rate change is "just and reasonable." TWC § 13.184(c). The Commission's decision is not arbitrary, capricious, an abuse of discretion, or violative of Double Diamond's due process rights. On the contrary, the Commission's decision is the result of a

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[2] Direct Testimony of Nelisa Heddin, WBRG Exhibit 1 at WBRG000020-000023 and WBRG000042-000044.
[3] Tr. at 156:11–21 (Grout Cross) (Oct. 24, 2017).
[4] DDU Response to WBRG RFI No. 3-5.

mountain of prolonged discovery paid for in large part by a small group of ratepayers, uncovering "over 17,000 pages of documents," and 200 requests for information. The evidentiary fact-finding in this case has been exhaustive, and exhausting.

For Double Diamond to claim at this late stage that the Commission has acted arbitrarily on this issue is disingenuous. As WBRG articulated in a prior motion:

> WBRG's position throughout the hearing was that DDU had failed to reconcile its claim of an 80% Developer/ 20% Utility split on the initial utility plant investment. DDU's response to this argument was that it did not have these records and that the records were irrelevant since it had no obligation to identify any of the plant as developer contributed. Now, at the very last minute, DDU claims that such records do exist, that the amounts can be reconciled, and DDU's brief offers testimony as to how the reconciliation can be made. DDU's brief contains two detailed pages of explanation and calculations. If DDU wanted to make this argument, it should have presented it in its direct case.
>
> DDU should not be allowed to claim during the hearing that the records did not exist, and now argue that the records do exist. DDU also should not be allowed to make the argument now based on workpapers not in evidence. DDU does not identify the source of its opinion that this is the proper way to "reconcile" these numbers. WBRG has not been given time to review or to cross-examine the source of this opinion. The Commission should ignore these arguments.

White Bluff Ratepayers Group's Reply Brief on Contribution Issues at 3, July 9, 2018 (internal citations omitted).

Double Diamond Points of Error No. 9 & 10

Double Diamond Points of Error No. 9 and 10 claim that the Commission's exclusion of certain labor costs from operations and maintenance expenses was arbitrary, capricious, an abuse of discretion, violates the Commission's statutory mandate, and imposes a new requirement and burden of proof on Double Diamond. Fatal to this argument is Double Diamond's own admission that "[t]he only evidence in the record is that these two employees work for White Bluff water and sewer systems and that a very limited amount [of] their time is spent installing taps." *See* Double Diamond Motion for Rehearing at 15. Double Diamond had the burden of proof in this rate change proceeding to show that its costs, including those for employee labor expenses, were just and reasonable.

Double Diamond was only able to account for what these two employees did during one percent of the test year. The Commission correctly identified that the evidence produced by

Double Diamond left 99% of these employees' time unaccounted for as "other duties." And since Double Diamond introduced no evidence to show that the "other duties" were tasks that are reasonable and necessary to provide service to the ratepayers, the Commission correctly excluded these costs.

Double Diamond Point of Error No. 13

Double Diamond Point of Error No. 13 claims that the Commission erred in excluding the value of assets identified in the trending study from the depreciation to which the utility is entitled. However, in making this contention, Double Diamond misreads the finding of fact upon which its argument is based.[5]

Finding of Fact No. 77 states "Ms. Harkins' use in her trending study, of January 1, 1996 as the installation date for the pipe work was reasonable and appropriate." Double Diamond reads this finding of fact as the Commission's conclusion that the use of a trending study was reasonable in this case. WBRG reads Finding of Fact No. 77 to state that the use of this specific date was reasonable, and WBRG does not read a finding of fact anywhere in the Final Order in this case concluding that Dr. Harkins' use of a trending study was reasonable or appropriate.

On the contrary, the Commission adopted the ALJ's proposal for decision ("PFD"), except as discussed in the Final Order.[6] The PFD includes a lengthy discussion on the impropriety of Double Diamond's use of a trending study in this proceeding, and ultimately concludes:

> The Commission has taken the position that trending studies are discouraged "except when historical records are unavailable from any source."[7] The ALJ interprets 16 Texas Administrative Code § 24.31(c)(2)(B)(i) to put the burden on DDU to show that its account balances do not reflect the original costs of the line work assets before estimating those costs by a trending study for purposes of determining rate base. The ALJ finds that DDU failed to meet that burden and therefore recommends the Commission disallow DDU's request for a known and measurable change to depreciation for both White Bluff and The Cliffs.

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[5] Double Diamond points to the Final Order's Findings of Fact 59 through 67 in its discussion of the trending study. WBRG believes Double Diamond intended to reference FOF 69 through 77, and will base its response on that understanding.

[6] "Except as discussed in this Order, the Commission adopts the proposal for decision, including findings of fact and conclusions of law." Final Order at 1, Aug. 30, 2018.

[7] *PUC Rulemaking Project to Amend Chapter 24 for the Implementation of Phase II of the Economic Regulation of Water and Sewer Utilities*, Project No. 43871, Order Adopting Amendments at 82 (Aug. 24, 2015).

Proposal for Decision at 29; *see also id.* at 27–29 (finding that even if the Commission determines that Double Diamond's use of the trending study was appropriate, the Commission should make a negative adjustment for purposes of determining the known and measurable change in depreciation based on Double Diamond's failure to offer evidence or argument to explain why it has no records of the original cost of the assets).

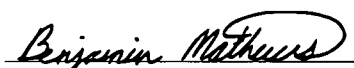
Since the Commission did not adopt a finding of fact or conclusion of law that Double Diamond's use of a trending study was acceptable, reasonable, or appropriate, and because the Commission adopted the ALJ's assertion that a negative adjustment should be made, WBRG asserts that the Commission did not err in concluding that the depreciation expense for any assets identified by this study should be excluded from operation and maintenance expense.

CONCLUSION & PRAYER

For the reasons outlined above, White Bluff Ratepayers Group prays the Commission deny the Motion for Rehearing filed by Double Diamond Utility Company, Inc. WBRG additionally prays for any further relief to which it has shown itself entitled.

Dated: October 9, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served on all parties of record in this proceeding on October 9, 2018, by hand-delivery, facsimile, electronic mail, and/or First Class Mail.

Benjamin Mathews

Benjamin D. Mathews