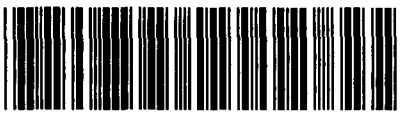

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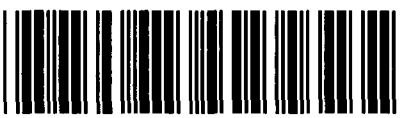

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PROJECT NO. 48937

RULEMAKING TO AMEND § 24.44	§	**PUBLIC UTILITY COMMISSION**
RATE-CASE EXPENSES PURSUANT	§	
TO TEXAS WATER CODE § 13.187	§	**OF TEXAS**
AND §13.1871	§	

COMMENTS ON THE PROPOSAL AMENDMENT TO 16 TAC § 24.44

The following are the comments of Mathews & Freeland, LLP on the Commission's proposed amendments to 16 TAC § 24.244 as published in the July 12, 2019, Texas Register.

Premature to Delete the 51% Rule

Based on our experience in prior cases, and after reviewing rate cases pending at the Commission, we believe it is premature to delete the 51% rule, at least as to Class B and Class C utilities. The 51% rule deters utilities from overreaching in rate change applications and provides a backstop to prevent utilities recovering rate case expenses when they do overreach.

The 51% rule is needed to protect against improperly prepared applications. Many Class B and Class C utilities cannot properly prepare rate change applications, leading to utilities seeking rate increases far beyond what they are entitled. For example, on November 1, 2018, in Docket No. 48790, a Class C utility filed an application seeking a rate increase based on a 261% return on rate base.[1] The application is blatantly incorrect, and is grossly overreaching in its request; yet the application continues to be processed and rate case expenses are accruing. This is not an atypical application. The ratepayers, and Commission Staff, should not have to spend their limited resources fixing these applications, only to have fight the utility over the recovery of rate-case expenses related to a poorly prepared application. Rate change applications are not rocket science. If a utility wants to recover rate case expenses, they need to at least put a modicum of effort into properly preparing an application. Until it is clear that water and sewer utilities understand the process and understand what a reasonable rate request looks like, the 51% rule will be needed.

The 51% rule is also needed to protect against gamesmanship in the filing in rate change applications. Class B and C utilities know that they might avoid close review of their applications if less than 10% of the ratepayers challenge an application. The possibility of avoiding close review is an incentive to seek rates higher than justified. If the overreach is discovered during the course

[1] *Application of Tall Pines Utility Company for Authority to Change Rates* at 65, Docket No. 48790 (Nov. 1, 2018) [AIS Item No. 2].

of the review, the utility can amend its application, or settle, and still recover rate case expenses. If the overreach is not discovered, then the utility earns a windfall. In Docket No. 46245, the applicant filed an application that represented that developer contributions were only $5,684, when in its prior application filed with the TCEQ, the utility had represented that developer contributions were more than $2 million.[2] This misrepresentation was discovered by the ratepayers, but only after the referral to SOAH. Had the application been filed properly to begin with, it is possible that no challenge would have been brought by the ratepayers, which would have saved the Commission and the ratepayers both time and money. The 51% rule provides some incentive to utilities to file accurate applications initially.

If anything, the Commission should provide an even stronger incentive to utilities to file properly prepared applications. The threshold should be raised to something higher than 51%, to at least 75%. A utility has the burden of proving its application. A utility should be able to fully support its application at the time the application is filed. Being able to support only 75% of its request should not be difficult. Because the amount of rate case expenses can easily exceed the increase in revenue requirements sought in an application, it is often not viable to try to contest an application that only seeks a modest over recovery. In essence, the 51% rule provides some incentive to pad an application (just not too much). A 75% rule would provide greater incentive to utilities to file adequate and supported applications.

In addition, the Commission should further improve the rule by making it clear that compliance with the 51% rule will be judged by the application that is referred to SOAH for hearing. In Docket No. 46245, as discussed previously, the utility filed an application that greatly overstated its invested capital and, correspondingly, its revenue requirement. After discovery, the ratepayers filed a motion to dismiss because of the misrepresentations contained in the application. In response, the utility agreed to amend the application to greatly reduce the requested rates. The utility subsequently argued that for purposes of the 51% rule, the level of reduction should be based on the amended revenue requirement, not as originally requested.

This approach is contrary to the policy behind the 51% rule, which is intended to provide a check on outrageous and wholly unsupported requests made by water and sewer utilities. If a utility asks for an increase which it cannot support, and the ratepayers spend their time and money

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[2] *White Bluff Ratepayers Group's Motion to Reject Application or Suspend Rates Based on Misrepresentations in the Application*, Docket 46245 (Nov. 15, 2016).

to prove the rates should be reduced, the ratepayers have earned the right to be relieved of the obligation to pay the utility's costs of preparing and litigating rates which were grossly overzealous.

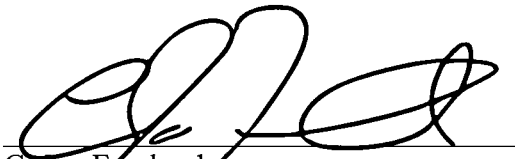
Unless this view is made clear in the rule, utilities will be incentivized to file applications seeking unsupported rates with the hope that if no ratepayers intervene, the Commission will grant the request, and if ratepayers intervene, the utility can come in and amend its rate request downward so that it can recover its rate case expenses after litigating a more reasonable request. This is unjust. Additionally, approach advocated by the utility in Docket No. 46245 deprives the parties of the opportunity to reach a compromise on rates. If a utility files a good-faith application to begin with, there is a greater likelihood that the parties will settle.

To accomplish this improvement, we recommend that the rule be modified as follows:

(b) A utility may not recover any rate-case expenses if the increase in revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than ~~51~~75% of the increase in revenues that would have been generated by a utility's proposed rate when referred to hearing.

We recognize that the proposed language for 16 TAC §24.44(e)(1) and (2) provide a mechanism to allow the Commission to make adjustments to a request for rate case expenses based on the failure to obtain the utility's requested revenue requirement. We believe that is an appropriate provision, but we believe the 51% rule is still needed to provide the necessary encouragement to utilities to prepare factually accurate applications initially.

Respectfully submitted



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