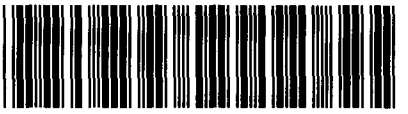

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February 19, 2019

Public Utility Commission
1701 North Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326

Re: Project No. 48937; *Rulemaking to Amend 24.44 Rate Case Expenses Pursuant to Texas Water Code 13.187 and 13.1871;* Comments on Strawman

To Whom It May Concern:

The following are my comments on the Strawman filed in this docket on January 9, 2019, and published in the Texas Register on January 18, 2019.

These comments are my own. My comments reflect my years of representing ratepayers and municipal regulatory authorities with regard to water and sewer rate cases at TCEQ and a number of water and sewer rate cases since the transfer of the program to the Commission. These include Docket Nos. 42858, 46245, 46256, 47626, 47976. These rate cases involved Class B and Class C utilities.

Premature to Delete the 51% Rule

Based on my experience in prior cases, and after reviewing rate cases pending at the Commission, I 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. Rather than deleting the rule, the Commission should strengthen the rule by raising the threshold to at least 75%.

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, 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 the utility recover rate-case expenses related to its poorly prepared application. Rate change applications are not rocket science. If a utility wants to recover rate

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

case expenses, they need to at least put a modicum of effort into properly preparing an application. Until that becomes the case, 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 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. The 51% rule provides some incentive to utilities to file honest and accurate applications.

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.

Need to Provide Flexibility

At the very least, the new rule needs to have language that sets out the criteria for review and determination of reasonableness., such as exists with regard to electric utilities. The Commission's rule for electric utilities includes a subsection (16 TAC 25.245(b)) entitled "Criteria for review and determination of reasonableness." This subsection directs the presiding officer to, among other things, determine whether the utility's proposal on an issue had a reasonable basis in law, policy, or fact, and whether the utility had a reasonable argument to extend, modify or reverse precedent. Additionally, the Commission's electric rate case expense rule (16 TAC 25.245(d)) allows a presiding officer to proportionately disallow rate-case expenses based on the outcome of the matter. Finally, the electric rule (16 TAC 25.245(b)(6)) includes a requirement that the utility show "the specific issue or issues in the rate case and the amount of rate-case expenses reasonably associated with each issue."

The Strawman should be revised to include language similar to the language in 25.245(b)6), (c), and (d). This language should be included regardless of the Commission's decision on the 51% rule.

Additional Issue

The Strawman should be revised to clarify that a utility cannot use an amendment to the application, after the application has been referred to SOAH, as a way to avoid the effects of the

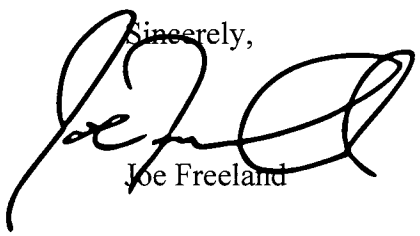
[2] *White Bluff Ratepayers Group's Motion to Reject Application or Suspend Rates Based on Misrepresentations in the Application*, Docket 46245 (Nov. 15, 2016).

51% rule, or proportionate disallowances such as authorized under 25.245(d). As explained previously, in Docket No. 46245 the utility filed an application with material misrepresentations that greatly increased the proposed rates. The utility only amended its application to correct the misrepresentations after the case was referred to SOAH and after the ratepayers had conducted discovery on the application. The ALJ subsequently held that the analysis under the 51% rule would be based on the rates sought in the amended application and not the rates sought in the original application.

Using a utility's amended request is contrary to the 51% rule and 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 that it cannot support, and the ratepayers spend their time and money 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 an application, that was far too high to begin with.

If allowed to amend applications to avoid the 51% rule, utilities will be incented to file applications seeking unsupported rates with the hope that no ratepayers intervene. This is particularly true for rate applications filed by Class B and C utilities, where the Commission might not thoroughly review an application unless 10% of the ratepayers petition the Commission. Utilities should not be motivated to ask for more than they can support, knowing that they can reduce the amount sought to a more realistic level later and still recover their rate case expenses. The Commission should encourage utilities to properly complete their rate change applications initially.

Sincerely,



Joe Freeland