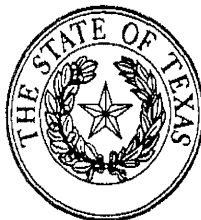


TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER DENYING THE APPLICATION OF BUENA VISTA WATER SYSTEM TO CHANGE RATES AND TARIFF, CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11656, BURNET COUNTY, TEXAS; TCEQ DOCKET NO. 2009-0504-UCR; SOAH DOCKET NO. 582-09-3642

On November 18, 2009, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Buena Vista Water System (Buena Vista) to change its rates and tariff under Certificate of Convenience and Necessity No. 11656, in Burnet County, Texas. A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing in this case on May 11, 2009, in Austin, Texas, and, after giving Buena Vista an opportunity to reply, recommended that the Commission grant, in part, motions for summary disposition denying the Application.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Procedural History

1. Buena Vista provides retail water utility service under Certificate of Convenience and Necessity No. 11656, in Burnet County, Texas.
2. On March 9, 2009, Buena Vista filed an application to change its rates and tariff. Buena Vista seeks authorization to impose a \$56.50 per month surcharge on each of its water

utility customers to repay a loan from the Texas Water Development Board (Board) to fund certain capital improvements to its system. It seeks no other change in its rates.

3. Buena Vista mailed notice of its application to each of its ratepayers on February 28, 2009.
4. More than 10 percent of Buena Vista's ratepayers timely asked for a hearing on the application.
5. On April 15, 2009, the Commission's Chief Clerk referred the application to SOAH for hearing.
6. Notice of the hearing was mailed by the Chief Clerk to Buena Vista, the Executive Director (ED), and the Office of Public Interest Counsel (OPIC) on April 17, 2009.
7. On April 23, 2009, Buena Vista mailed notice of the hearing to each of its ratepayers.
8. The notices of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
9. On May 11, 2009, the ALJ held a preliminary hearing as indicated in the notices, and jurisdiction was proven. The following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
Buena Vista	Nancy Donnelly
ED	Ron M. Olson
OPIC	Eli Martinez
Buena Vista Property Owners Association (Association)	Roger Borgelt

10. At the preliminary hearing, the ED asked the ALJ to set an interim rate of zero dollars for the surcharge that Buena Vista seeks in this case.
11. The ALJ agreed with the ED's arguments and granted the ED's motion to set an interim rate of zero dollars concerning the requested surcharge.
12. The ED also indicated at the preliminary hearing that he intended to file a motion for summary disposition denying Buena Vista's application. The Association indicated that it, too, might file a motion for summary disposition.
13. As agreed upon by the parties and ordered by the ALJ, any motion for summary disposition was due by May 22, 2009, and any response to a motion for summary disposition was due by June 22, 2009.
14. On May 21, 2009, the ED and on May 22, 2009, the Association filed motions for summary disposition.
15. In their motions for summary disposition, the ED and the Association mainly argued that imposing a surcharge on customers to repay a loan that does not and may never exist because it had not even been applied for would be unjust and unreasonable. The Association also argued that Buena Vista's application did not meet other requirements for approval.
16. Buena Vista did not respond to the motions for summary disposition by the deadline to which it had agreed and the ALJ had ordered.

Purpose of the Surcharge

17. In the notice of the proposed rate change that Buena Vista prepared and included in its application, Buena Vista stated that its surcharge request was for:

Proposed construction cost of water treatment plant improvements, elevated storage and ground storage tank, distribution and transmission lines, pump station.

To correct TCEQ enforcement violations. \$1,070,000.00 at 5% for 240 months. Each of the 125 customers' monthly surcharge amount is \$56.50. [*sic*]

18. The mentioned interest rate indicates that the surcharge would be used to repay a loan.
19. In response to a question on the application form asking how and when it would correct existing deficiencies, Buena Vista referred to a loan application to the Texas Water Development Board (Board) and stated it was the “[p]urpose of this surcharge.”
20. A letter of November 14, 2008, was also attached to the application, which apparently had supported a previous surcharge application that Buena Vista has now resubmitted. In the letter, Buena Vista requested approval of a surcharge:

... for the proposed construction costs of the water treatment plant improvements, elevated storage and ground storage tank, distribution and transmission lines, pump station, etc. to correct the TCEQ enforcement violations associated with the treatment and distribution systems. . . . Buena Vista Water System is requesting financial assistance from the Texas Water Development Board to upgrade the treatment, storage, and distribution system to bring it into full compliance with state regulations. . . .

21. At the preliminary hearing Buena Vista's representative, Ms. Donnelly, explained that Buena Vista was seeking approval of the surcharge to give it a stream of revenue to repay a loan from the Board that Buena Vista will use to pay for capital improvements.
22. Based on the above Findings of Fact, Buena Vista is seeking the surcharge to repay a loan from the Board.

There Is No Loan or Application for a Loan

23. Buena Vista has no existing loans, grants, or pending applications with the Board. Buena Vista was invited to apply for a loan in 2008 and 2009. It applied in 2008, but never finalized its application. It did not apply at all in 2009.

A Reserve Is Not Required To Apply For a Board Loan

24. A retail water utility is not required to have a pre-application cash reserve to partially assure repayment of a loan from the Board before applying for such a loan.

II. CONCLUSIONS OF LAW

1. Buena Vista Water System is a retail public utility under TEXAS WATER CODE ANN. (Water Code) § 13.002(19) and a public utility under Water Code § 13.002(23).
2. The Commission has jurisdiction to consider an application for a rate increase filed by a retail public water utility, pursuant to Water Code § 13.042(e).
3. All required notices of the application and the preliminary hearing on it were given as required by law, including Water Code § 13.187 and TEX. GOV'T CODE ANN. (Government Code) §§ 2001.051 and 2001.052.
4. The ALJ conducted a preliminary hearing and proposed a decision on the application under the authority of chapter 2003 of the Government Code and chapter 13 of the Water Code.
5. Commission rule 80 TAC § 80.137(c) provides:

Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.
6. The material facts set out in the above Findings of Fact are not in genuine dispute.
7. A surcharge is an authorized rate to collect revenues over and above the usual cost of service. 30 TEX. ADMIN. CODE (TAC) § 291.21(k)(1).

8. A utility must use the revenues collected pursuant to a surcharge only for the purposes noted in the application submitted by the utility to the commission, unless otherwise directed by the ED. 30 TAC § 291.21(k)(3).
9. In any proceeding involving any proposed change of rates, the burden of proof shall be on the utility to show that the proposed change, if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. Water Code § 13.184(c).
10. Based on the above Findings of Fact and Conclusions of Law, the proposed surcharge is unjust and unreasonable because the claimed purpose is to repay a Board loan that does not exist, has not been applied for, and would not require a repayment reserve if applied for.
11. Based on the above Findings of Fact and Conclusions of Law, the motions for summary disposition should be granted in part.
12. Based on the above Findings of Fact and Conclusions of Law, Buena Vista's application should be denied.


NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT:

1. The application of Buena Vista Water System to change its rates and tariff under Certificate of Convenience and Necessity No. 11656, in Burnet County, Texas, is denied.
2. The Chief Clerk of the Commission shall forward a copy of this Order to each party.
3. All other motions, requests for specific Findings of Fact or Conclusions of Law, and other requests for general and specific relief, if not expressly granted, are denied for want of merit.

4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

ISSUED: NOV 23 2009

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY


Bryan W. Shaw, Ph.D., Chairman

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

November 24, 2009

TO: Persons on the attached mailing list.

RE: Buena Vista Water System
TCEQ Docket No. 2009-0504-UCR; SOAH Docket No. 582-09-3642
Certificate of Convenience and Necessity No. 11656

Decision of the Commission on Application.

The Texas Commission on Environmental Quality ("TCEQ" or "Commission") has made a decision to deny the above-referenced matter. Enclosed with this letter is a copy of the Commission's order. Unless a Motion for Rehearing ("MFR" or "motion") is timely filed with the chief clerk, as described below, this action of the Commission will become final. A MFR is a request for the Commission to review its decision on the matter. Any motion must explain why the Commission should review the decision.

Deadline for Filing Motion for Rehearing.

A MFR must be received by the chief clerk's office no later than 20 days after the date a person is notified of the Commission's order on this matter. A person is presumed to have been notified on the third day after the date that this order is mailed.

Motions may be filed with the chief clerk electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and 7 copies with the Chief Clerk at the following address:

LaDonna Castañuela, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512/239-3311

In addition, a copy of the motion must be sent on the same day to each of the individuals on the attached mailing list. A certificate of service stating that copies of the motion were sent to those on the mailing list must also be sent to the chief clerk. The procedures for filing and serving motions for rehearing and responses are located in 30 Texas Administrative Code (TAC) §80.272 and 30 TAC §1.10-1.11. The hardcopy filing requirement is waived by the General Counsel pursuant to 30 TAC §1.10(h).

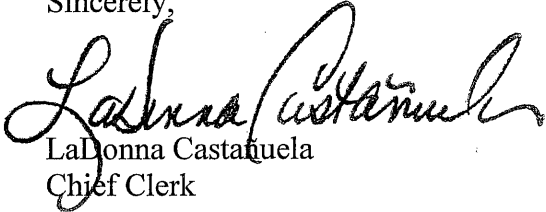
The written motion must contain (1) the name and representative capacity of the person filing the motion; (2) the style and official docket number assigned by SOAH or official docket number

assigned by the Commission; (3) the date of the order; and (4) a concise statement of each allegation of error.

Unless the time for the Commission to act on the motion is extended, the MFR is overruled by operation of law 45 days after a person is notified of the Commission's order on this matter.

If you have any questions or need additional information about the procedures described in this letter, please call the Office of Public Assistance toll free at 1-800-687-4040.

Sincerely,



LaDonna Castañuela
Chief Clerk

LDC/ms

Enclosure

MAILING LIST
Buena Vista Water System
TCEQ Docket No. 2009-0504-UCR
SOAH Docket No. 582-09-3642

FOR THE APPLICANT:

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INTERESTED PERSONS:

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FOR THE CHIEF CLERK
via electronic mail:

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Office of Chief Clerk MC-105
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* The Honorable William G. Newchurch
Administrative Law Judge
State Office of Administrative Hearings
P. O. Box 13025
Austin, Texas 78711-3025

* Courtesy Copy via inter-agency mail