

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:)
PETITION OF B&W PIPELINE, LLC)
FOR AN INCREASE IN RATES) **DOCKET NO. 15-00042**

**CONSUMER ADVOCATE'S BRIEF IN OPPOSITION TO THE RECOVERY OF
\$225,585.31 IN ACQUISITION COSTS**

Comes the Consumer Protection and Advocate Division of the Office of the Attorney General ("Consumer Advocate"), and hereby opposes B&W Pipeline, LLC's ("B&W") request to recover acquisition costs in the amount of \$225,585.31 in this hearing for reconsideration of the TRA's previous decision in this case. On April 15, 2016, the TRA granted B&W's *Petition for Reconsideration*, in part, on the issue of \$225,585.31 in acquisition costs:

With respect to acquisition costs of \$225,585.31, which the company claims were part of the administrative record and were improperly excluded from rate base, I move to grant reconsideration. The hearing officer shall work with the parties to schedule arguments based on the existing record for the next Authority conference. I so move.

TRA Conference (April 15, 2016) at 24:14-20 (emphasis added).

As will be discussed, one of the largest items in dollar terms included in these acquisition costs is "due diligence" costs of \$218,392.52. The due diligence costs however, were not incurred in order to provide service to consumers, but instead were for the benefit of the owners or shareholders of the company. Accordingly, it is improper to include due diligence costs in rate base and allow for their recovery from consumers.

Breakdown of Acquisition Costs at Issue for Reconsideration

B&W has asked the TRA to reconsider its ruling that the following specific acquisition costs are disallowed¹:

Due Diligence	\$218,392.52
Other Equipment	\$541.20
Organization Start-up	\$4,004.44
Property Taxes	\$220.60
Right of Way	<u>\$2,426.55</u>
Total:	\$225,585.31

Due Diligence and Organization Start-up Costs Benefit Shareholders Not Ratepayers and Should Be Excluded From Rate Base.

The issue of whether a utility should be allowed to recover due diligence costs was addressed in the case *In re: Joint Petition Of Tennessee American Water Company, The City Of Whitwell, Tennessee, And The Town Of Powells Crossroads, Tennessee For Approval Of A Purchase Agreement And A Water Franchise Agreement And For The Issuance Of A Certificate Of Convenience And Necessity ("Whitwell")*, TRA Docket No. 12-00157. In that case, the TRA excluded due diligence costs from recovery on the ground that such costs benefited shareholders rather than consumers:

The majority of the panel reasoned that while due diligence costs are not costs associated with the delivery of water services, such costs may be incurred to safeguard the assets of the Company, thus protecting the interests of the shareholders and ratepayers. To allow recovery of a cost incurred to benefit shareholders but funded solely by ratepayers is unacceptable. In this docket, the Company failed to provide sufficient evidence to persuade the Authority to allow

¹ See *Response to First Request of the Consumer Advocate and Protection Division of the Attorney General's Office* 1-5 (July 2, 2015), TRA Docket No. 15-00042.

recovery of due diligence costs above TAWC's necessary operation costs. For example, a significant amount of the due diligence costs incurred to date and estimated costs post closing are related to services rendered by the AWWSC. AWWSC allocates its costs to affiliate companies such as TAWC that receive services from AWWSC. TAWC's allocated share of these costs are already included in its operating expenses and recovered from ratepayers through their base rates. The Company did not produce evidence demonstrating these costs were not already included in the AWWSC allocation or proving that AWWSC needed to hire additional personnel to perform duties related to due diligence activities. Therefore, allowing TAWC to recover these costs could result in a double recovery of the cost or recovery when there was no incremental cost incurred above normal operating expenses. In addition, the Company failed to provide evidence that other due diligence costs for which it seeks recovery provide any benefit to ratepayers or that they are necessary operation costs. Accordingly, the majority of the panel voted to deny TAWC's request to defer due diligence costs but, instead, voted to allow TAWC to expense the amounts as they are incurred. (Footnotes omitted.)

Order Approving Purchase Agreement, Franchise Water Agreement And Certificate Of Public Convenience And Necessity (October 15, 2013) at 21-22, TRA Docket No. 12-00157 (emphasis added).

Similarly, in the B&W case, there is no proof that the due diligence costs at issue were “associated with the delivery of . . . [utility] services” or were “incurred to safeguard the assets of the Company, thus protecting the interests of the shareholders and ratepayers.” The same can be said for the \$4,004 in “organization start-up costs:” there is no evidence that they were incurred to do anything other than to form the company in a way that benefited the owners, not the ratepayers. Furthermore, to the extent the organization start-up costs were to form a corporation or LLC, \$4,004 is an excessive amount. Accordingly, B&W's request to recover due diligence costs, as well as organization start-up costs, should be denied.

The decision of the TRA in *Whitwell* denying acquisition costs is in accord with decisions in other states. For example the Missouri Public Service Commission held as follows:

Transaction costs are generally not recovered through rates but rather charged to shareholders because transaction costs consist of costs incurred by both the

acquiring company as well as the acquired company to complete the transaction, and not to facilitate the provision of utility service – such costs are properly considered to be a part of the purchase price of the acquisition.

Absent the specific rate and accounting treatment being requested by the Applicants, pursuant to Generally Accepted Accounting Principles, transaction costs would be added to the value of the consideration . . . to arrive at the total purchase price of the transaction.

Transaction costs do not meet the normal criteria for traditional expenses used to establish rates. These costs are not used or useful nor necessary for the provision of safe and adequate service. These costs are investor costs incurred in the buying and selling of their stock. . . . Great Plains and its Board decided to incur these costs. . . .²

The commission denied recovery of the transaction costs, concluding that allowing recovery would have “the same effect of artificially inflating rate base in the same way as allowing recovery of an acquisition premium.”³ It further concluded “it is not a detriment to the public interest to deny recovery of the transaction costs”⁴

In examining due diligence and organization start-up costs, the TRA should consider that this company “started-up” without consumer benefits in mind. Specifically, from its inception, when it sought a CCN, B&W announced its intention to cease serving eight customers. *Order Granting Certificate of Public Convenience and Necessity* at fn. 6, p. 4, TRA Docket No. 13-00151 (Jan. 8, 2015). Organizing a utility that intends to cut off service to consumers is hardly a benefit to those consumers.

Finally, even if the TRA were to allow recovery of due diligence and organization start-up costs, these costs should be allocated between the oil wells portion of the purchase and the

² *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, 266 P.U.R.4th 1, 240-42 (Mo. P.S.C., 2008).

³ *Id.* at 472-73.

⁴ *Id.* at 473.

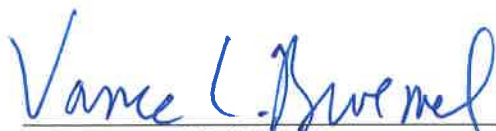
pipeline portion. B&W provided no such allocation in the record. Accordingly, the recovery should be denied. If, however, the TRA attempts to develop an allocation factor, it should use the 89%/11% figure developed by Ralph Smith, 89% oil wells / 11% pipeline. *Final Order Setting Rates* at 13, TRA Docket No. 15-00042 (March 10, 2016); *Pre-Filed Direct Testimony of Ralph C. Smith* at 17:10-14, TRA Docket No. 15-00042 (August 11, 2015).

Other Costs

In addition to due diligence and organization start-up costs, B&W is also seeking to recover for “other equipment,” “property taxes,” and “right of way costs.”

There is currently nothing in the record substantiating these costs. Accordingly, they should be denied.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 26th day of May, 2016.

Vance L. Broemel
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