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MANSIONS AT TURKEY CREEK, LP
Petitioner

BEFORE THE PUBLIC UTILITY
COMMISSION OF TEXAS

v.

NORTHWOOD MUNICIPAL
UTILITY DISTRICT NO. 1 OF
HARRIS COUNTY, TEXAS
Respondent

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§

AND/OR

THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**MANSIONS AT TURKEY CREEK, LP
TEXAS WATER CODE § 13.043
FIRST AMENDED PETITION FOR REVIEW**

TO THE PUBLIC UTILITY COMMISSION OR THE HONORABLE ADMINISTRATIVE LAW
JUDGE:

MANSIONS AT TURKEY CREEK, LP ("Petitioner" or "MTC") files this its Texas Water
Code § 13.043 First Amended Petition for Review and complains of NORTHWOOD MUNICIPAL
UTILITY DISTRICT NO. 1 OF HARRIS COUNTY, TEXAS ("Respondent" or the "MUD"), and
would show the following:

I. PARTIES

1. Petitioner, MANSIONS AT TURKEY CREEK, LP, is a Texas limited partnership
that conducts business in the State of Texas.

2. Respondent, NORTHWOOD MUNICIPAL UTILITY DISTRICT NO. 1 OF HARRIS
COUNTY, TEXAS, upon information and belief, is a municipal utility district created under Article
III, Section 52, or Article XVI, Section 59, of the Texas Constitution that provides water and sewer
service to household users, including MTC, which has appeared herein, and may be served by and
through its President, John Perches, 101 W Burleson St., Wharton, Wharton County, Texas

77488-5003, or its attorney of record, Dax W. Philbin, Paul A. Philbin & Associates, P.C., 6363 Woodway, Suite 725, Houston, Texas 77057, or wherever such persons may be found.

3. The Public Utility Commission of Texas ("PUC") is the agency of the State of Texas with jurisdiction to review appeals under Texas Water Code § 13.043. This Petition is being filed with the PUC, located at 1701 N. Congress Avenue, P.O. Box 13326, Austin, TX 78711-3326.

II. JURISDICTION & VENUE

4. The PUC has jurisdiction over this matter pursuant to Chapter 13 of the Texas Water Code (the "Code"), as well as the following authorities: *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 340 (Tex. App.—Fort Worth 2005, no pet.); *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552 (Tex. App.—Texarkana 2003, pet. denied); *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 876 (Tex. 2005); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Tex. A&M University-Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002); *City of Houston v. Jones*, 197 S.W.3d 391, 392 (Tex. 2006) (per curiam); *Catalina Development, Inc. v. County of El Paso*, 121 S.W.3d 704, 705 (Tex. 2003); and/or *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 901 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

5. Subject to a motion changing venue to Houston, Harris County, Texas, and without waiving any right to file the same, venue is proper in Austin, Travis County, Texas.

6. Petitioner incorporates herein the facts set forth below.

III. BACKGROUND & FACTS

7. Petitioner, MTC, is the owner of an improvement on real property, *i.e.*, an apartment community known as the Mansions at Turkey Creek apartments (the "Apartments"), located at 20919 Birnam Wood Blvd., Humble, Harris County, Texas 77338. MTC is the ratepayer under

Chapter 13 of the Texas Water Code since MTC pays for water service. The Apartments are located within the MUD's service area, and the MUD provides water and sewer services to the Apartments. The owner of the underlying real property upon which the Apartments sit is the Houston Housing Authority ("HHA"). HHA is not the ratepayer under Chapter 13 of the Water Code. Upon information and belief, HHA is exempt from ad valorem taxes, per applicable law. Therefore, the MUD does not derive ad valorem tax revenue from the Apartments.

8. On or about July 15, 2014, the MUD adopted No. 14-01 AMENDED ORDER ESTABLISHING RATES FOR WATER AND SEWER SERVICE (hereinafter the "14-01 Order"). The prior rate order, No. 13-01 AMENDED ORDER ESTABLISHING RATES FOR WATER AND SEWER SERVICE (hereinafter the "13-01 Order"), was adopted on March 13, 2013.

9. While 13-01 Order was in effect, MTC was charged for water under the MUD's multi-family buildings customer class, at \$18.00 times the number of residential units.

10. 14-01 Order established a new customer class called "Tax Exempt or Out of District Service." This new customer class charged customers, including MTC, "2 ½ time the regular in District rate." The increased rate became effect August 1, 2014.

11. Thus, for example, on MTC's July 30, 2014 water bill, the MUD charge \$6,230.00 for water. But on the August 29, 2014 water bill, after 14-01 Order became effective, the MUD charged \$16,295.50 for water for the same number of units in the Apartments, which is over 2.5 times the previously month's bill.¹ Applying that rate increase into the future, MTC will end up paying approximately \$100,000 more a year for the same amount of water, serving the same number of units in the Apartments.

12. Prior to the 14-01 Order being adopted and the new increased rate being effective, the MUD sent a letter to HHA notifying it of the MUD's intent to begin assessing rates that "are 2.5

¹Therefore, MTC is a ratepayer "whose rates have been changed" by the 14-01 Order. See TEX. WATER CODE § 13.043(c); 30 TEX. ADMIN. CODE § 291.41(b), (d).

times the current rate.” The letter expressly stated that “Northwood is assessing the rate to make up for the loss of future tax revenues from the Mansions at Turkey Creek Apartments.” Stated another way, the MUD letter provided that “[t]he reason for the increase is the loss of tax base previously provided by the apartments” after HHA acquired the property. As such, under the 14-01 Order, the MUD was expressly using its power to charge water rates through an illegal scheme to recover tax revenue that it could assess without violating applicable tax exemption laws. In short, the MUD was making an end-run around the Texas Legislature’s decision to create tax exemptions for certain types of entities.

13. As purported legal cover for this unlawful rate increase, the MUD’s letter referred to Section 49.2122 of the Texas Water Code, which provides as follows:

(a) Notwithstanding any other law, a district may establish different charges, fees, rentals, or deposits among classes of customers that are based on any factor the district considers appropriate, including:

(1) the similarity of the type of customer to other customers in the class, including:

- (A) residential;
- (B) commercial;
- (C) industrial;
- (D) apartment;
- (E) rental housing;
- (F) irrigation;
- (G) homeowner associations;
- (H) builder;
- (I) out-of-district;
- (J) nonprofit organization; and
- (K) any other type of customer as determined by the district;

(2) the type of services provided to the customer class;

(3) the cost of facilities, operations, and administrative services to provide service to a particular class of customer, including additional costs to the district for security, recreational facilities, or fire protection paid from other revenues; and

(4) the total revenues, including ad valorem tax revenues and connection fees, received by the district from a class of customers relative to the cost of service to the class of customers.

(b) A district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously.

The MUD, however, upon information and belief, was not aware that the TCEQ (the predecessor to the PUC for this type of petition for review) had construed Section 49.2122 of the Texas Water Code in an order dated August 19, 2009, which related to six certified questions from a group of SOAH judges.

14. In that order, the TCEQ concluded that Section 49.2122(b) does not create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious. Instead, the TCEQ concluded that “Section 49.2122(b) only create[s] a presumption that customer classes established by a district are properly established absent a showing that the district action setting rates was arbitrary and capricious.” Most significantly, the TCEQ concluded that “a district whose ratepayers have appealed under Texas Water Code Section 13.043(b) must still demonstrate that its rates are just and reasonable [under] Texas Water Code Sections 13.043(j) and 30 Texas Admin Code Section 291.12 and 291.41(i).”

15. Upon information and belief, during the time that 14-01 Order was in effect, MTC was the only tax-exempt or out-of-district ratepayer, or alternatively, represents greater than ten (10) percent of those “ratepayers whose rates have been changed and who are eligible to appeal under Subsection (b) of” Chapter 13 of the Texas Water Code. *See* TEX. WATER CODE § 13.043(c); 30 TEX. ADMIN. CODE § 291.41(b), (d).

16. On or about October 21, 2014, apparently in response to MTC’s Original Petition, the MUD adopted No. 14-02 AMENDED ORDER ESTABLISHING RATES FOR WATER AND SEWER SERVICE (hereinafter the “14-02 Order”). 14-02 Order did away with the new customer class created by the 14-01 Order, called “Tax Exempt or Out of District Service.” Thus, under the 14-02 Order, MTC is now included once again in the “Multi-Family Buildings” customer class.

17. Per an admission of the MUD’s attorney, the MUD only has three water or sewer service customers. The only “Multi-Family Buildings” customer is MTC. The other two customers

include a gas station and an auto parts store. Upon information and belief, therefore, the other two customers are considered as part of the "Commercial Buildings" customer class.

18. Upon information and belief, now that the 14-02 Order is in effect, MTC is the only "Multi-Family Buildings" ratepayer, and additionally, or in the alternative, represents greater than ten (10) percent of those "ratepayers whose rates have been changed and who are eligible to appeal under Subsection (b) of" Chapter 13 of the Texas Water Code. *See* TEX. WATER CODE § 13.043(c); 30 TEX. ADMIN. CODE § 291.41(b), (d). In fact, since there are only three customers, MTC would represent 33.34% of the "ratepayers whose rates have been changed" under the 14-02 Order, and the only ratepayers' rates who have changed for the worse (i.e., increased) when compared to the 13-01 Order.

19. Just like the short-lived 14-01 Order, the 14-02 Order significantly increases rates for both water and sewer service when compared to the 13-01 Order. Specifically, under the 13-01 Order, water was only \$18.00 times the number of residential units in the Apartments. Under the 14-02 Order, however, water is \$30.00 times the number of residential units in the Apartments, constituting a 66.67% increase in the charge for water service. Similarly, under the 13-01 Order, sewer service was \$20.50 times the number of of residential units in the Apartments. Under the 14-02 Order, however, sewer service is \$30.00 times the number of residential units in the Apartments, constituting a 46.34% increase in the charge for sewer service.²

20. As a result of the MUD's higher water and sewer rates for the Apartments, MTC is being forced to pay unjust, unreasonable, excessive, prejudicial, arbitrary, capricious, and discriminatory fees for water and sewer service since October 21, 2014. *See* TEX. WATER CODE § 13.043(j) (stating the PUC "shall ensure that every rate made, demanded, or received by any retail

² Notably, as a result of the 14-02 Order, the sewer rates for the "Commercial Buildings" customers have gone down from the 13-01 Order from a \$35.00 minimum to a \$30.00 minimum, and water rates have gone down from the 13-01 Order from a \$50.00 minimum to a \$30.00 minimum.

public utility . . . shall be just and reasonable . . . [and] shall not be unreasonably preferential, prejudicial, or discriminatory”).

21. In addition, or in the alternative, to the foregoing, the MUD acted arbitrarily and capriciously in adopting the 14-02 Order. Upon information and belief, the MUD did not procure any water rate study to show that the cost of providing water or sewer service to the Apartments had increased, and in particular, by the percentages referenced above as to each type of service. As such, the MUD acted arbitrarily and capriciously in establishing the rates in the 14-02 Order.

22. Simply put, MTC asserts that not only did the MUD act arbitrarily and capriciously in setting the rates in the 14-02 Order but that the rates in the 14-02 Order are unjust, unreasonable, excessive, unreasonably preferential, prejudicial, arbitrary, capricious, and discriminatory in violation of the Texas Water Code and the common law.

23. In addition to the foregoing, MTC asserts that Section 49.2122 applies only to the establishment of customer classes. MTC asserts that the Texas Legislature did not intend that Section 49.2122(b) would supplant the longstanding duty of the PUC (or its predecessors) to ensure that rates are just and reasonable under Section 13.043(j) and 30 TEX. ADMIN. CODE § 291.41(i), the longstanding procedural rule under 30 TEX. ADMIN. CODE § 291.12 that the “the burden of proof shall be on the provider of water and sewer services to show that the proposed change . . . is just and reasonable,” or the longstanding “comprehensive regulatory system” under Chapter 13 of the Texas Water Code enacted “to assure rates, operations, and services that are just and reasonable to the consumers.” TEX. WATER CODE § 13.001(c). MTC asserts that because Section 49.002(a) of the Texas Water Code provides that “the specific provisions in such other chapter or Act shall control” in the event of a conflict, Section 49.2122 cannot, as a matter of law, control over any conflicting portion of Chapter 13, such as the PUC’s duty to ensure that rates are just and reasonable. MTC and the MUD, upon information and belief, disagree on the statutory construction of Section 49.2122 and Section 13.043(j).

24. Declarations that Texas Water Code § 49.2122(b) does *not* create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious, that a district whose ratepayers have appealed under Texas Water Code Section 13.043(b) must still demonstrate that its rates are just and reasonable, and that Texas Water Code § 49.2122(b) only creates a presumption that the customer classes established by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious, would resolve controversies between the parties. Additionally, declarations that Texas Water Code § 49.2122(a) does not permit MTC to include in its water rates costs that are unrelated to providing water service and that MTC's water rate must relate to its actual cost of providing the charged-for service (water service), in accordance with *Black v. City of Killeen*, 78 S.W.3d 686, 694 (Tex. App.—Austin 2002, pet. denied) (stating “[i]t is well established that a utility’s final rate must relate to its actual cost of providing the charged-for service”) and other applicable law, would resolve controversies between the parties.

IV. CLAIMS AND RELIEF REQUESTED

25. Petitioner incorporates herein by reference the above paragraphs.

Violations of the Texas Constitution, Texas Water Code, and Texas Common Law

26. The primary purpose of the per unit fee in the 14-02 Order is to raise the MUD's revenues, and therefore, the per unit fee is a tax. *Beckendorff v. Harris-Galveston Coastal Subsidence Dist.*, 558 S.W.2d 75, 79-80 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (stating “[i]f the primary purpose of the charge is to raise revenues then it is a tax”). As a tax, such fees must comply with the Texas Constitution, which provides taxes “shall be equal and uniform.” TEX. CONST. art. VII, § 1; *Bynum v. Alto Indep. Sch. Dist.*, 521 S.W.2d 656, 658 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.). The amount of the total fees under the 14-02 Order for the Apartments in relation to the MUD's costs for providing water to the same, greatly exceeds the total fees under the 14-02 Order for other types of water and sewer users in relation to the MUD's costs

for providing water to those other water users. The 14-02 Order is in reality a tax scheme to provide revenues to the MUD, and is therefore unlawful and violates Article VIII, Section 1 of the Texas Constitution and other applicable Texas law. *See, e.g.,* TEX. WATER CODE § 13.043; TEX. CONST. art. VII, § 1; *Bynum*, 521 S.W.2d at 658; *Beckendorff*, 558 S.W.2d at 79-80. MTC has been injured by the MUD's unlawful and unconstitutional tax scheme, as described above.

27. Specifically, MTC has been forced, under duress,³ to pay the increased water rates which are in reality an illegal tax. As such, MTC is entitled to, and hereby seeks, a reimbursement of those fees that are illegal taxes. *See Bolton*, 185 S.W.3d at 877 (stating reimbursement of illegal fees and taxes allowed when public entity compels compliance with void law and subjects person to punishment if he refuses or fails to comply).

28. The rates in the 14-02 Order are not related to the direct and indirect costs for the charged-for service. *Black v. City of Killeen*, 78 S.W.3d 686, 694 (Tex. App.—Austin 2002, pet. denied) (stating that “a utility’s final rate must relate to its actual cost of providing the charged-for service”). Accordingly, the rates established by the MUD in its 14-02 Order are unjust, unreasonable, excessive, unreasonably preferential, prejudicial, arbitrary, capricious, and discriminatory, in violation of the Texas Water Code and resulting in discriminatory charges to MTC as between persons similarly situated in violation of Texas law. *See id.*; TEX. WATER CODE § 13.043.

Right to Damages: Refund and Lost Revenues

29. As a result of the MUD's unjust, unreasonable, excessive, unreasonably preferential, prejudicial, arbitrary, capricious, and discriminatory water rates for apartments, MTC has sustained damages in a sum to be shown by proof at a final hearing, including the overcharges paid under the 14-02 Order and any lost revenues. TEX. WATER CODE § 13.043(a) (stating the “final order . . . may include reasonable expenses incurred in the appeal proceedings” and the “commission . . . may order

³ Section 5 of the 14-02 Order permits the MUD to disconnect water service if MTC fails to pay the increased rates. As such, MTC is paying the increased rate under duress, while reserving all rights and under protest.

refunds or allow a surcharge to recover lost revenues”). Additionally, pursuant to *Bolton*, 185 S.W.3d at 877, MTC is entitled to a reimbursement of those overcharges.

Request for PUC to Fix Just and Reasonable Rates

30. Pursuant to Chapter 13.043(a) of the Texas Water Code, Petitioner requests that the PUC “fix in its final order the rates the governing body [of the MUD] should have fixed.” TEX. WATER CODE § 13.043(a).

Texas Water Code § 13.043(h) Request for Interim Rates

31. Pursuant to Chapter 13.043(h) of the Texas Water Code, Petitioner hereby requests that the PUC “establish interim rates to be in effect until a final decision is made.” TEX. WATER CODE § 13.043(h).

Request for Declaratory Relief

32. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, Petitioner hereby requests a declaration that the 14-02 Order is unjust, unreasonable, excessive, unreasonably preferential, prejudicial, arbitrary, capricious, and discriminatory, to the extent it raises rates, as set forth above, for the Apartments. MTC also seeks declaratory relief under Chapter 37 of the Texas Civil Practice & Remedies Code declaring that the MUD’s increased water rate under 14-02 Order is nothing more than an illegal tax, which MTC has been forced to pay under duress, as set forth above.

33. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, MTC hereby requests a declaration that the Legislature did not intend that Section 49.2122(b) would supplant the longstanding duty of the PUC to ensure that rates are just and reasonable under Section 13.043(j) and 30 TEX. ADMIN. CODE § 291.41(i), the longstanding procedural rule under 30 TEX. ADMIN. CODE § 291.12 that the “the burden of proof shall be on the provider of water and sewer services to show that the proposed change . . . is just and reasonable,” or the longstanding “comprehensive regulatory

system” under Chapter 13 of the Texas Water Code enacted “to assure rates, operations, and services that are just and reasonable to the consumers.” TEX. WATER CODE § 13.001(c).

34. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, MTC hereby requests a declaration that because Section 49.002(a) of the Texas Water Code provides that “the specific provisions in such other chapter or Act shall control” in the event of a conflict, Section 49.2122 cannot, as a matter of law, control over any conflicting portion of Chapter 13, such as the PUC’s duty to ensure that rates are just and reasonable.

35. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, MTC hereby requests declarations that Texas Water Code § 49.2122(b) does *not* create a presumption that rates set by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious, that a district whose ratepayers have appealed under Texas Water Code Section 13.043(b) must still demonstrate that its rates are just and reasonable, and that Texas Water Code § 49.2122(b) only creates a presumption that the customer classes established by a district are properly established absent a showing that the district action setting the rates was arbitrary and capricious.

36. Additionally, pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, MTC hereby requests declarations that Texas Water Code § 49.2122(a) does not permit MTC to include in its water rates any costs that are unrelated to providing water service and that MTC’s water rate must relate to its actual cost of providing the charged-for service (water service), in accordance with *Black v. City of Killeen*, 78 S.W.3d 686, 694 (Tex. App.—Austin 2002, pet. denied) and other applicable law.

V. CONDITIONS PRECEDENT

37. Any and all conditions precedent to the establishment of all causes of action entitling MTC to recover on its claims as set forth herein have been performed, have occurred, have been fully

and completely satisfied or have been waived by Respondent prior to the filing of this petition for review.

VI. ATTORNEYS' FEES

38. Due to the necessity of the institution of this petition for review, MTC has been forced to retain counsel and incur expenses in the nature of reasonable attorneys' fees and court costs. In connection therewith, MTC has retained the law firm of Hoover Slovacek LLP, duly licensed Texas attorneys, as counsel to represent it and has, in connection therewith, agreed to pay reasonable attorneys' fees. An award of MTC's reasonable and necessary attorneys' fees would be equitable and just, and therefore authorized by Section 37.009 of the Texas Civil Practice and Remedies Code. An award of MTC's reasonable and necessary attorneys' fees would be necessary and proper pursuant to Section 37.011 of the Texas Civil Practice and Remedies Code. Additionally, an award of attorneys' fees is appropriate for trial and/or for any appeal of the final decision in this case pursuant to Texas Water Code § 13.382. Accordingly, MTC, Petitioner herein, seeks recovery of such reasonable attorneys' fees throughout trial and any and all appeals.

VII. EXPERTS

39. MTC hereby designates the undersigned attorneys, Dylan B. Russell or other attorneys in the firm as its experts to testify as to reasonable and necessary attorneys' fees incurred by MTC in the preparation, discovery, and trial of this lawsuit. MTC also designates any other counsel associated with the undersigned law firm who may be handling this suit at the time of trial as its expert on the issue of reasonable and necessary attorneys' fees incurred by MTC in this lawsuit. Additionally, MTC is entitled to recover its expert witness fees for trial and/or for any appeal of the final decision in this case pursuant to Texas Water Code § 13.382.

VIII. RELIEF REQUESTED


WHEREFORE PREMISES CONSIDERED, Petitioner, MANSIONS AT TURKEY CREEK, LP , prays that Respondent, NORTHWOOD MUNICIPAL UTILITY DISTRICT, be cited to appear and answer herein and that Petitioner have the following relief:

- a. that the PUC or the ALJ of SOAH issue an order, pursuant to Chapter 13.043(h) of the Texas Water Code, establishing “interim rates to be in effect until a final decision is made”;
- b. that the PUC or the ALJ of SOAH or otherwise issue an order fixing “in its final order the rates the governing body [of the MUD] should have fixed”;
- c. that the PUC or the ALJ of SOAH issue an order providing for the declaratory relief, by way of PUC or SOAH order or otherwise, as requested above;
- d. that the PUC or the ALJ of SOAH or otherwise issue an order awarding MTC its actual damages in an amount within the jurisdictional limits of the PUC or the SOAH;
- e. that the PUC or the ALJ of SOAH or otherwise issue an order awarding MTC a refund of rates it has paid that are determined to be unjust, unreasonable, excessive, unreasonably preferential, prejudicial, arbitrary, capricious and/or discriminatory;
- f. actual and consequential damages;
- g. prejudgment interest as provided by law;
- h. attorneys’ fees, expert witness fees, and costs at trial and on appeal;
- i. post-judgment interest as provided by law from the date of judgment until paid; and
- j. such other and further relief, general and special, both at law and equity, to which MTC may show itself to be justly entitled.

Respectfully submitted,

MANSIONS AT TURKEY CREEK, LP,
By and through its attorneys of record, listed
below:

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