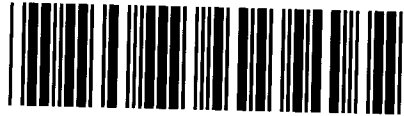


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PETITION OF THE	§	
RATEPAYERS OF THE	§	
RIVER PLACE WATER AND	§	
WASTEWATER SYSTEMS	§	PUBLIC UTILITY COMMISSION
APPEALING THE RETAIL WATER	§	
AND WASTEWATER RATES OF	§	
THE CITY OF AUSTIN	§	OF TEXAS

PETITIONERS' RESPONSE
TO THE CITY OF AUSTIN MOTION TO DISMISS

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

COME NOW, the Ratepayers of the River Place Water and Wastewater Systems ("Ratepayers" or "Petitioners") and file this Response to the City's of Austin's ("City") Motion to Dismiss and would respectfully show the following:

I. BACKGROUND

On October 1, 2014, the City began serving the ratepayers of the River Place Water and Wastewater Systems ("River Place Systems"). The same day that the City assumed responsibility for serving the ratepayers via the River Place Systems, the City changed the retail water and wastewater rates charged to Petitioners to a rate unrelated to the cost of service for operating the River Place Systems. The City again raised Petitioners' retail rates a month later on November 1, 2014.

On December 22, 2014, in accordance with Texas Water Code §§ 13.043(b)(3), (i), and (h) and the substantive rules of the Commission, Petitioners filed a petition appealing the City's change in the retail water and wastewater rates, which became effective on both October 1, 2014 and November 1, 2014. On January 27, 2015, this case was referred to the State Office of Administrative Hearings ("SOAH") to hear the appeal. Subsequently, the parties filed lists of issues to address during the hearing, and the

administrative law judge issued an order scheduling various due dates (including the setting of a prehearing conference).

On February 23, 2015, the City filed a Motion to Dismiss the Petitioners' appeal ("City's Motion") asserting the Commission and SOHA lacked jurisdiction. Pursuant to P.U.C PROC. R. 22.181(a)(2), this Response, filed within 20 days of the City's Motion, is timely filed.

II. LEGAL AUTHORITY AND FACTS

Petitioners filed their appeal challenging the City's change in its water and wastewater rates pursuant to § 13.043(b) of the Texas Water Code, which states in pertinent part:

(b) Ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water, drainage, or sewer rates to the utility commission . . . (3) a municipally owned utility, if the ratepayers reside outside the corporate limits of the municipality.¹

Undisputedly, the City affected the Petitioners' water and wastewater rates, and the Petitioners reside outside of the City's corporate limits.² The City provides water and wastewater services to the Petitioners through its utility, Austin Water, which the City owns, operates, and controls.³

Section 13.043 dictates the timing for filing an appeal as well as the number of customers who must sign the appeal petition:

(c) An appeal under Subsection (b) must be initiated by filing a petition for review with the utility commission and the entity providing service within 90 days after the effective day of the rate change. . . . The petition must be signed by the lesser of 10,000 or 10 percent of those ratepayers whose rates have been changed and who are eligible to appeal under Subsection (b).⁴

¹ TEX. WATER CODE ANN. § 13.043(b)(3).

² See City's Motion, at COA 001, and Attachment 1 to Exhibit A, at COA 009.

³ *Id.*; see also TEX. WATER CODE ANN. § 13.002(13) (defining a municipality as a retail public utility).

⁴ TEX. WATER CODE ANN. § 13.043(c).

The date Petitioners filed their appeal, December 22, 2014, was within 90 days of the effective date of each of the City's two rate hikes, which occurred on October 1, 2014 and November 1, 2014, respectively. Nearly 360 customers signed the petition in this matter, which was more than 10% of 1,047 water customers and 1,035 wastewater customers of the River Place Systems.⁵

Pursuant to state law, the City must follow specific public notice requirements, informing its customers of the rate change:

(i) The governing body of a municipally owned utility . . . , within 60 days after the date of a final decision on a rate change, shall provide individual written notice to each ratepayer eligible to appeal who resides outside the boundaries of the municipality or the political subdivision. The notice must include, at a minimum, the effective date of the new rates, the new rates, and the location where additional information on rates can be obtained. The governing body of a municipally owned utility . . . may provide the notice electronically if the utility or political subdivision has access to a ratepayer's e-mail address.⁶

The City did not provide individual written notice to each ratepayer of the River Place Systems within 60 days of the City Council's decision to raise Petitioners' rates in accordance with this statutory requirement.

III. ARGUMENT

Section 13.043(b)(3) of the Water Code clearly grants the Commission with the authority and jurisdiction to hear an appeal of any ratepayer of a municipally owned utility that reside outside the corporate limits of the municipality. The City's real issue is not whether the Commission has jurisdiction to hear the appeal; rather, the City seems to argue that the Petitioners did not file their petition timely.

⁵ See Petition, at 3.

⁶ TEX. WATER CODE ANN. § 13.043(i).

A. October 1, 2014 Rate Change

Despite the City's argument otherwise, the effective day of the rate change was October 1, 2014. The word choice in the City's Motion intentionally sidesteps the express language and meaning of the applicable statute in an attempt to create a jurisdictional issue that does not exist.

Section 13.043(c) sets out the requirements for filing a petition for review with the Commission, including the timing of when ratepayers must file a petition and the number of signatures required on the petition. For a petition filed under § 13.043(b)(3), the ratepayers must file the petition within 90 days after the effective date of the rate change.⁷

The City seems to argue that the date that matters is the date on which the Austin City Council adopted the City's budget, which included a rate table for in-City retail customers. However, § 13.043(c) specifically differentiates between the "effective day of the rate change" and the "date on which the governing body . . . makes a final decision."⁸ The date of the change in rates is the date for determining whether ratepayers filed an appeal timely under § 13.043(b)(3), not the date that the City Council adopted its rates. The rules of statutory construction⁹ prevent the Commission from reading the statute as urged by the City. Moreover, as evidenced by Attachment 1, Exhibit B, of the City's Motion, the City's rates were not effective until sometime in October 2014¹⁰

Applying the City's reasoning that the City really changed its rates on September 9, 2013¹¹ when the City Council adopted its budget, then the City was required to notify petitioners of the October 1, 2014 rate change by November 8, 2013, which the 60-day requirement on under § 13.043(i). The City did not send any notice on or before November 8, 2014.

⁷ TEX. WATER CODE ANN. § 13.043(c).

⁸ TEX. WATER CODE ANN. § 13.043(c).

⁹ TEX. GOV'T CODE ANN. § 331.011 et seq. (words and phrases shall be construed according to the rules of common usage, a just and reasonable result is presumed, a result feasible of execution is intended, etc.).

¹⁰ City's Motion, Exhibit B, Attachment 1, River Place MUD Residential Customer Bill Comparison (Petitioners' rates prior to October 1, 2014 are referenced as "River Place Existing Bills" and new City rates as "COA Bills Oct 2014").

¹¹ See City's Motion, Exhibit A, Affidavit of Robert Rowan, at COA 006.

Not only did the City fail to provide the required notice, but the Petitioners were not City customers at that time anyway. The City would put Petitioners in the impossible position of appealing increased rates that did not apply to them, did not affect them, and for which they had no legal notice. Such an appeal would not have been ripe, and the Petitioners would have lacked standing. The City's misinterpretation of the statute would eviscerate the purpose of this law, which is to ensure water and wastewater rates are just and reasonable.

The City contends that, "all that occurred on October 1, 2014 was the application of the City rates to the Petitioners *pursuant to the contractual agreement between the City and River Place MUD.*"¹² Here, the City concedes the flaw in its reasoning – the contract is with the prior utility service provider, not the Petitioners. On its face, the referenced contractual agreement states that it is an agreement between the City of Austin and the Municipal Utility District ("MUD").¹³ The *ratepayers* of the River Place Systems, the Petitioners in this docket, are not parties to any agreement with the City of Austin, including the referenced contractual agreement between the City and the former service provider. Furthermore, the MUD is not a party in this rate appeal. As such, there is no privity of contract between the City and the Petitioners, and Petitioners are not subject to the terms of the agreement. The intent of the law is to protect the individual consumer, not to allow an end-run around the notice requirement by calling it a transfer¹⁴ per contract.

B. November 1, 2014 Rate Change

Notwithstanding the City's argument otherwise, the Petitioners had the requisite number of signatures on the Petition to appeal the November 1, 2014 rate change.¹⁵ The City concedes raising Petitioners rates again effective November 1, 2014.

As shown above, the City's October 1, 2014 rate change was not effective. The City failed to provide the proper notice as required under § 13.043 (i), which nullifies the

¹² City Motion, p. 3

¹³ City Motion, Exhibit A, Attachment 1, at COA 007.

¹⁴ The applicable statute is silent on "transfers."

¹⁵ See Petition, at 3.

October 1, 2014 rate change. Also, the October 1, 2014 rate change was not based upon the City's cost of providing service via the River Place Systems. Therefore, the new rate was neither just nor reasonable, and it was not effective.¹⁶ As such, the rate in effect before the November 1, 2014 rate change is the same rate that was in effect before the City's proposed October 1, 2014 rate change. The only City customers that incurred the November 1, 2014 change in rates were the ratepayers of the River Place Systems.

Again, the City misapplies the plain language of the statute. The determination of the number of required signatories on the petition is based upon the number of customers that experienced the same change in their rate, not the number of customers that have the same rate.¹⁷ Here again the City adds words to the statute that do not exist. Section 13.043(c) does not say "all" of the City's customers with the same rate must be considered in the calculation of signatories needed to file a petition. No other out-of-City customers, other than the ratepayers of the River Place Systems, experienced the change in rates as the Petitioners experienced.

C. Failure to Provide Proper Notice

However, even if the City were correct that Petitioners lacked a sufficient number of signatures on the Petition challenging that rate increase, the City's notice of the rate change is still defective for multiple reasons. The City's September 5, 2014 letter is not a notification of a rate change at all, but a confusing jumble of information with no mention of a rate change on October 1, 2014 or November 1, 2014.

The alleged notice fails to meet the minimum notice requirements of § 13.043 (i): the effective date of the new rates, the new rates, and the location where ratepayers can obtain additional information on the new rates.¹⁸ Neither the form letter nor the attached schedule includes the actual effective date of each of the City's new rates. In fact, the attached schedule mentions the billing periods of October 2014 and November 2014, not the effective date of each of the new rates.

¹⁶ See TEX. WATER CODE ANN. § 13.043(j) (*requiring* all rates to be just and reasonable).

¹⁷ TEX. WATER CODE ANN. § 13.043(c).

¹⁸ See TEX. WATER CODE ANN. § 13.043(i).

The form letter merely talks about the transfer process, the future annexation, and an opportunity to attend an open house. Nowhere are customers informed how to locate information about the new rates.

Despite Ms. Guerrero's affidavit attached to the City's pleading (signed and attested more than 5 months after the alleged event), there is no evidence that the one-page table labeled "River Place MUD Residential Customer Bill Comparison"¹⁹ was attached to the September 5, 2014 letter from Mr. Meszaros. Even had the table been attached, it provides no notification, constructive or otherwise, that the ratepayers of the River Place Systems should anticipate a rate increase 54 days later on November 1, 2014, let alone on October 1, 2014. There is also no evidence that the City's September 5, 2014 form letter addressed to "New Austin Water Customer" even notified *each ratepayer eligible to appeal who resides outside the boundaries*, including Ratepayers of the River Place Water and Wastewater Systems.

D. "Reasonable Expenses"

The City argues that it is entitled to recoup reasonable expenses incurred in this proceeding pursuant to P.U.C. Subst. R. 24.41(e)(2). As the Commission knows, the City is entitled to recover rate case expenses only if the Commission finds that both the City's proposed rates are just and reasonable and the rate case expenses are reasonable.

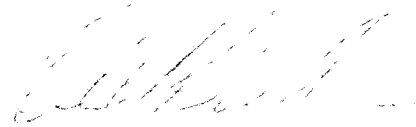
IV. CONCLUSION

For the reasons set out above, Petitioners respectfully request that the Commission issue an Order Denying the City's Motion to Dismiss and grant the Petitioners other and such relief to which Petitioners are entitled.

¹⁹ Ms. Guerrero refers to this bill comparison as a "rate schedule," but that term does not appear anywhere within Attachment 1 to Exhibit B.

Respectfully submitted,

Randall B. Wilburn
Gilbert Wilburn, PLLC
State Bar No. 24033342
7000 North MoPac Blvd., Suite 200
Austin, Texas 78731
Telephone: (512) 535-1661
Telecopier: (512) 535-1678



By: _____

Randall B. Wilburn

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties on the 2nd of March 2015.



By: _____

Randall B. Wilburn