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

**CITY OF AUSTIN'S REPLY TO PETITIONERS' RESPONSE TO
CITY'S MOTION TO DISMISS FOR LACK OF JURISDICTION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the City of Austin and files this Reply to Petitioners' Response ("Response") to the City's Motion to Dismiss for Lack of Jurisdiction and would respectfully show the following:

I. AUTHORITY FOR APPEAL

A. Ratepayer Eligibility to Appeal

As Petitioners correctly state in their Response, the statutory basis for Petitioners' right to appeal is Section 13.043(b) (3) of the Texas Water Code:

(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;

(4) a district or authority created under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution that provides water or sewer service to household users

The Austin City Council is the governing body of the City of Austin, a home-rule municipality.

The Austin Water Utility is a municipally owned utility of the City of Austin. A plain reading of

Section 13.042(b)(3), as applied, is that *ratepayers of the Austin Water Utility who reside outside Austin's City limits may appeal a decision of the Austin City Council affecting their water or sewer rates to the Public Utility Commission.*

The City and River Place Municipal Utility District ("River Place MUD") entered into the *Agreement for Water and Wastewater Service and Operations and Management of Facilities between the City of Austin and the River Place Municipal Utility District; and Amendment to Agreement for Emergency Water Service* ("the Agreement") effective September 9, 2009. River Place MUD is "a conservation and reclamation district created and operating as a municipal utility district pursuant to the provisions of Chapters 49 and 54, Texas Water Code." See preamble of the Agreement¹. Ratepayers of River Place MUD which "received water or sewer service for household users" could appeal a decision of their governing body, the River Place MUD Board of Directors, affecting their water or sewer rates under TEX. WATER CODE, Section 13.043(b)(4).

B. Commission Jurisdiction to Hear an Appeal

As Petitioners point out in their Response and Petition, Section 13.043(c) of the Texas Water Code limits Commission jurisdiction to hear an appeal under Section 13.043(b)(3), by placing threshold conditions on a petition for review:

(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).**

[Emphasis supplied.]

¹ Attachment 1 to Exhibit A of the City's Motion to Dismiss.

A plain reading of the second sentence of Section 13.043(c), as restated in context, is that *the petition for review must be signed by ten percent of Austin Water's ratepayers residing outside Austin's City limits (those eligible under 13.043(b)(3) whose rates have been changed.*

II. ARGUMENT

A. October 1, 2014 Application of City Rates to River Place Ratepayers

The City did not change its water or sewer rates effective October 1, 2014, and Petitioners have provided no evidence to the contrary. Petitioners complaint is of the effect of the terms of the Agreement, a contract which transferred them as customers from one service provider (River Place MUD) to another (the City of Austin), and the resulting rates charged for those services by the succeeding service provider – a complaint for which the Commission has no jurisdiction under Section 13.043(b)(3). Petitioners assert in Paragraph 2.1 of their Petition, and reassert on Page 4 of their Response, that the City imposed new water and wastewater rates on Petitioners on or about October 1, 2014. As explained in the City's Motion to Dismiss, the only action that occurred on October 1, 2014 was the transfer of customers from the River Place Municipal Utility District ("River Place MUD") to the City of Austin via operation of the Agreement, a negotiated contract between the City and River Place MUD². The customers of the MUD became City of Austin retail water and sewer customers, receiving and paying for services that were billed according to the City's retail water and sewer rates already in effect by action of the Austin City Council over a year previous to the filing of the Petition.³ There was no decision on or about October 1, 2014 by "the governing body of the entity affecting their water, drainage, or sewer rates" to increase Petitioners' rates. The October 1, 2014 alleged rate change that is the basis of Petitioners' complaint was not an action for which Section 13.043(b)(3) grants a right of

² See Attachment 1 to Exhibit A of the City's Motion to Dismiss.

³ See Exhibit A of the City's Motion to Dismiss.

appeal. Petitioners' complaint is of the terms and conditions of the Agreement transferring them as customers from the MUD to the City, and the difference in what the MUD charged for water and wastewater utility services as compared to what the City charges for its services; a complaint for which Section 13.043(b)(3) provides no right of appeal to the Commission.⁴

On September 30, 2014, the day before Petitioners became the City's customers by operation of the Agreement, Petitioners were receiving service from the River Place MUD at the MUD's rates. As Petitioners clarify in their Response on Pages 4 and 5, Petitioners were not retail water or sewer service customers of the City before October 1, 2014. It is unclear from Petitioners' arguments whether Petitioners are attempting to appeal a decision of the Austin City Council to change the rates of the River Place MUD or the rates of the City. The Austin City Council did not change the River Place MUD's rates. The Austin City Council did not have the legal authority to do so. Nor did the City Council change the City's rates on or about, or to be effective, October 1, 2014.

Section 13.043(b)(3) of the Texas Water Code plainly authorizes ratepayers outside the corporate limits of a municipality to appeal a *decision of the governing body* of the entity "affecting their water, drainage, or sewer rates to the utility commission." In most cases, the "decision" in question is an ordinance of the municipally owned utility which set the rates that are appealed. In this case, there is no relevant "decision" by the City of Austin, other than to execute and implement the *September 7, 2009 Agreement for Water and Wastewater Service and Operations Management of Facilities between the City of Austin and the River Place Municipal Utility District; and Amendment to Agreement for Emergency Water Service* between Austin and River Place MUD. While Petitioners' water and sewer rates were affected as a result of the terms and conditions of the Agreement, there is no statutory authority for Petitioners to appeal to

⁴ On page 5 of in Petitioners' Response, it appears that Petitioners are raising issues relating to a contract claim.

the PUC regarding the terms of the Agreement, which included the changed rates. The Texas Legislature simply did not provide for an appeal of a rate change where the rate change is a consequence of an Agreement, a contract between Austin and the River Place MUD Board. It was the actions of the River Place MUD Board of Directors and the City of Austin in September 2009 which affected the water and sewer rates of Petitioners, not any action of the Austin City Council on or about October 1, 2014.

Petitioners cite no authority in support of their argument that the Commission has jurisdiction to hear an appeal of rates that stem from the application of rates via the terms and conditions of a contractual Agreement which was finalized years before the appeal regarding rates which were set over a year before the appeal. Petitioners do, however, agree that the October 1, 2014 rates they are attempting to appeal are those rates that originate purely from the City's compliance with the terms of the Agreement, and not from a decision of the Austin City Council to change the City's retail water and wastewater rates. *See* Petitioners' Response to Motion to Dismiss at Page 5. As such, there is absolutely no basis in law under Section 13.043 of the Texas Water Code for the appeal of the rates applied to Petitioners for the one month time period between October 1, 2014 and November 1, 2014, and therefore no jurisdiction for the Commission to hear such an appeal.

Additionally, Petitioners' argument that the 360 signatories to their Petition lack "privity of contract" under the Agreement between River Place MUD and Austin is at odds with the caselaw. Clearly, all 360 signatories of the Petition are beneficiaries of the Agreement. Consequently, their quarrel is with the River Place Board of Directors which executed the Agreement on their behalf. Moreover, third party beneficiaries to a contract have the same standing to complain about a contract as do the parties to the contract. *See Allan v. Nersesova,*

307 S.W. 3d 564, 571 (Tex. Civ. App., -- Dallas 2010, *no pet.*). Petitioners could have complained about the clearly stated terms and conditions of the Agreement, including the water and wastewater utility service rates, charges and billing at the time the Agreement was authorized and executed by the River Place MUD Board of Directors.

B. November 1, 2014 Change in Rates

The Commission lacks jurisdiction to hear Petitioners' appeal of the rate change effective November 1, 2014 because the Petition fails to include the statutory minimum number of signatures: "the lesser of 10,000 or 10 percent of those ratepayers whose rates have been changed and who are eligible to appeal."⁵ On September 8, 2014, the City Council made a decision *uniformly affecting the rates of all ratepayers outside the City's corporate boundaries effective November 1, 2014*; not just those ratepayers residing in River Place.⁶ The Commission has jurisdiction to hear appeals of such decisions, provided a petition for review containing the required percentage of affected ratepayers is timely filed.⁷ Because the Austin City Council changed the rates for all of the City's retail water and wastewater ratepayers residing outside the City, the number of ratepayers eligible under Section 13.043(b)(3) of the Texas Water Code to appeal its September 8, 2014 decision was 11,240 ratepayers for the water rate change and 5,209 for the wastewater rate change.⁸ Applying the statutory minimum of ten percent, the signatures of at least 1,124 eligible ratepayers were required to appeal the water rate change and the signatures of at least 520 signatures of eligible ratepayers were required to appeal the wastewater rate change.

⁵ TEX. WATER CODE §13.043(c)

⁶ See Exhibit A to City's Motion to Dismiss, Affidavit of Robert Rowan.

⁷ TEX. WATER CODE §13.043(c)

⁸ Id. and Exhibit A to City's Motion to Dismiss, Affidavit of Robert Rowan.

It is undisputed that the Petition does not include the required minimum number of signatures for an appeal. The Petitioners claim to have obtained 359 signatures from ratepayers formerly served by the River Place MUD. *See* Petition at ¶3.4. Section 13.043(b)(3) of the Texas Water Code clearly states that all ratepayers of a municipally owned utility residing outside the corporate limits of a municipality are eligible to appeal. The statute further provides that a minimum number of the group of ratepayers eligible to appeal – those outside the City’s limits whose rates have been affected by a decision to change their rates – must sign and timely file the petition for review before the Commission has jurisdiction. The Petitioners are attempting to circumvent the statutory minimum required number of signatures for an appeal by referencing a limited subset of the group of eligible ratepayers in order to decrease the number of signatures needed for the Commission to exercise appellate jurisdiction. Once again, there is absolutely no authority cited by Petitioners for their proposition that the Texas Water Code does not mean what it plainly states: “[t]he 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).” *See* TEX. WATER CODE §13.043(c). Once again, the November 1, 2014 rates were changed for all City of Austin customers, and the ratepayers “eligible to appeal under Subsection (b)” were “the ratepayers [that] reside outside the corporate limits of the municipality.” *See* TEX. WATER CODE §13.043(b). The Water Code clearly does not allow for the petition to be signed by 10 percent of a *subset* of ratepayers that reside outside the corporate limits of the municipality; it unmistakably mandates “the lesser of 10,000 or 10 percent of those ratepayers whose rates have been changed and who are eligible to appeal.” Therefore, the Petitioners must have the signatures of at least 1,124 eligible ratepayers to appeal the water rate change, and the signatures of at least 520 signatures of eligible ratepayers to appeal the

wastewater rate change. Because the Petitioners have failed to obtain the requisite number of signatures to initiate an appeal, the Commission has no jurisdiction over Petitioners' request for an appeal of the City's November 1, 2014 retail water and wastewater rates.

C. Notice of Rate Change

Petitioners also argue that the City failed to provide proper notice as required by Section 13.043(i) of the Texas Water Code. However, the uncontroverted evidence shows that Petitioners were provided individual written notice of the rates that were going to change on October 1, 2014 and November 1, 2014.⁹ Moreover, the notice sent to each River Place MUD customers included: the effective date of the rates, what the rates would be, and the website to go to and phone numbers to call for additional information.¹⁰ Therefore, contrary to Petitioner's assertions, the City did provide notice as required by law.

III. CONCLUSION

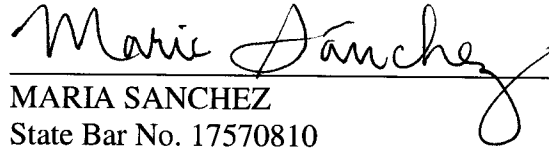
For the reasons set forth above, the City of Austin respectfully requests that the Commission grant its Motion, and dismiss the Petition with prejudice. The City of Austin also requests any other and such relief to which it may entitled, including but not limited to, the Commission granting the City of Austin, under P.U.C. SUBST. R. 24.41 (e)(2), its reasonable expenses incurred in this proceeding.

⁹ See Exhibit B, Attachments 1 & 2, to City's Motion to Dismiss.

¹⁰ See Exhibit B, Attachment 1, to City's Motion to Dismiss.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, INTERIM CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION DIVISION

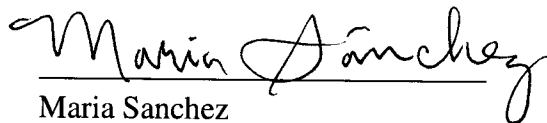


MARIA SANCHEZ
State Bar No. 17570810
MEITRA FARHADI
State Bar No. 24036547
Assistant City Attorneys
City of Austin-Law Department
P. O. Box 1546
Austin, Texas 78767-1546
(512) 974-1354
(512) 974-1311 [Facsimile]
maria.sanchez@austintexas.gov

ATTORNEYS FOR CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding on this the 9th day of March 2015, by first class, U.S. Mail, postage prepaid.



Maria Sanchez
Assistant City Attorney