



Control Number: 44010



Item Number: 62

Addendum StartPage: 0

**SOAH DOCKET NO. 473-15-2123.WS
PUC DOCKET NO. 44010**

**PETITION OF THE RATEPAYERS OF
THE RIVER PLACE WATER AND
WASTEWATER SYSTEMS APPEALING
THE RETAIL WATER AND
WASTEWATER RATES OF THE
CITY OF AUSTIN**

§
§
§
§
§
§

BEFORE THE STATE OFFICE

ORAL HEARINGS

ADMINISTRATIVE HEARINGS

**CITY OF AUSTIN'S RESPONSE TO PETITIONERS'
MOTION FOR PARTIAL SUMMARY DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

NOW COMES the City of Austin, (herein sometimes referred to as "City," "Austin" or "Respondent"), in the above styled and docketed retail water and wastewater rate appeal proceeding and serves this, the City of Austin's Response to Petitioners' Motion for Partial Summary Decision. Austin would respectfully show the State Office of Administrative Hearings ("SOAH") Administrative Law Judges ("ALJs") as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

1. On December 22, 2014, Petitioners (the Ratepayers of the Former River Place Water and Wastewater Systems and sometimes referred to as the "former River Place ratepayers") filed the *Original Petition Appealing Retail Water and Wastewater Rates of the City of Austin* ("Original Petition") before the Public Utility Commission of Texas ("Commission" or "PUC").
2. On March 23, 2015 the ALJs convened the first Prehearing Conference in the above styled and docketed water and wastewater rate appeal.
3. On March 26, 2015 the ALJs issued *SOAH Order No. 4 Memorializing Prehearing Conference; Establishing Filing Deadline; and Notice of Prehearing Conference*.

4. On April 14, 2015 the City filed *City of Austin's Additional Jurisdictional Argument and Evidence*.
5. On April 14, 2015, Petitioners filed *Petitioners' Motion for Partial Summary Decision and Brief in Response to Order No. 4* (sometimes referred to in this pleading as, "Petitioners' Motion").
6. On April 15, 2015, Austin filed an Unopposed Motion for Continuance for medical reasons. The ALJs granted Austin's requested continuance in Order No. 5.
7. Both Order No. 4 and Order No. 5 state that the matters to be considered at the second prehearing conference are:
 - a. Interim rates;
 - b. Any motion filed by 3:00 p.m. on February 12, 2015, and emailed, hand-delivered, or sent via facsimile to the ALJs on that day;
 - c. A procedural schedule;
 - d. Any other matters that may assist in the disposition in a fair and efficient manner.
8. On April 21, 2015, Austin filed its *Preliminary Response to Petitioners' Motion for Partial Summary Decision* and PUC Staff filed its *Response to Petitioners' Motion for Partial Summary Decision and Brief in Response to Order No. 4*.
9. On May 6, 2015, the ALJs issued Order No. 6 *Ruling on Jurisdiction, Notice and Request for Interim Rates*.
10. On May 18, 2015, Austin filed its *Appeal of SOAH Order No. 6 and Motion for Reconsideration*.
11. On May 21, 2015, PUC Staff filed its *Response to the City of Austin's Motion for Reconsideration*.
12. On May 22, 2015, Austin filed its *Reply to Commission Staff's Response to the City of Austin's Motion for Reconsideration*.

13. On May 26, 2015, Commission Staff filed its *Response to the City of Austin's Appeal of SOAH Order No. 6* and Petitioners filed their *Response to the City of Austin's Appeal of SOAH Order No. 6*.
14. On May 26, 2015, the ALJs issued *Order No. 7 Denying Motion for Reconsideration; Adopting Procedural Schedule; and Notice of Hearing*, wherein the ALJs ordered that all responses to the pending motion for summary disposition be filed on or before June 5, 2015.
15. On May 28, 2015, Commission Advising served their notice that no commissioner voted to add the appeal of SOAH Order No. 6 to an agenda meeting.
16. On June 4, 2015, Austin filed *City of Austin's Motion for Reconsideration of the Commission's Denial of the City of Austin's Appeal of SOAH Order No. 6* (referred to herein as "Austin's Motion for Reconsideration"). In Austin's Motion for Reconsideration, Austin asked the Commission to reconsider its denial of Austin's Appeal of SOAH Order No. 6, because the jurisdictional issues were not resolved properly by the ALJs.

II. PROCEDURAL RULES FOR SUMMARY DECISION

PUC Proc. R. §22.182(a) establishes the criteria for summary decision. Summary decision is available:

[O]n any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue of material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion.

In this case, there are significant genuine issues of material fact which remain in dispute. First and foremost is whether Petitioners are entitled to any relief—summary or otherwise—from SOAH and the PUC in the absence of a valid petition. Austin continues to assert that Petitioners

have failed to meet the criteria established by the Texas Legislature to invoke the Commission's jurisdiction regarding the November 1, 2014 City of Austin rates for outside city limits residential retail water and wastewater utility service. The ALJs in Order No. 6 have announced an analysis that factually demonstrates that Petitioners are entitled to no relief under Tex. Water Code, §13.043 for the November 1, 2014 rate change. Petitioners' own motion confirms the fact the Petitioners are not entitled to appeal Austin's November 1, 2014 rate change because they fail to constitute the jurisdictional number of ratepayers who are entitled to appeal under Tex. Water Code, §13.043(c). At the same time, Austin maintains that Petitioners' Motion on behalf of the so-called "Ratepayers of River Place Water and Wastewater Systems" is not supported by any summary decision evidence which could support the validity of the Original Petition or Petitioner's Motion; nor does the "evidence" define any ratepayers entitled to relief under Tex. Water Code, §13.043.

III. RESPONSE TO FIRST GROUND FOR PARTIAL SUMMARY DECISION

The original premise of Petitioners' Motion—that Austin is required to follow established PUC rules in its retail ratemaking—is legally flawed. Petitioners admit that the Commission's rules are not completely determinative in evaluating Austin's water and wastewater rates that are charged to the Petitioners. Austin is not a "public utility" under Chapter 24 of the PUC's substantive rules. And while PUC Subst. R., Chapter 24, including §24.31(a), may provide "significant guidance" about the Commission's policy in evaluating the justness and reasonableness of rates, as Petitioners assert, such rules do not state the manner in which a municipally owned utility owned and operated by a home rule city such as Austin *must* use to determine just and reasonable rates. Tex. Water Code, §13.043 provides the Commission with

appellate jurisdiction only. The Commission's determination of whether Austin's residential retail water and wastewater rates are just and reasonable for Petitioners is an inherently fact based inquiry. The applicable provisions of the Water Code do not provide Petitioners with a "short cut" to the ultimate issue in this case. This is especially true if the substantive rules only provide "guidance" rather than legally binding *direction* to a municipal retail public utility.

Petitioners mischaracterized Austin's ratemaking process and its responses to discovery. Petitioners imply that Austin has not used a cost of service study to derive just and reasonable water and wastewater rates applicable to this petitioner group. Nothing is further from the truth. At the appropriate time in this case, if necessary, Austin may present to the ALJs and the Commission with evidence of the factual details of Austin's comprehensive and complex cost of service model which was derived from its current cost of service water and wastewater rate studies. Austin uses its cost of service model to develop just and reasonable rates for *all* of its water and wastewater customers. Petitioners cite only a portion of Austin's response to PUC Staff's RFI Request 1-1 in their pleading. The complete request and response is as follows:

Staff 1-1 Please state whether the City completed a cost of service study for the water rate increases for the retail water and wastewater customers of the River Place Water and Wastewater Systems, effective on October 1, 2014 and November 1, 2014, prior to that date.

Response: **Austin developed the City of Austin cost of service rate methodology, as set forth in the 2008 City of Austin Cost of Service Rate Study, and the City of Austin Cost of Service Rate Model. Austin defines a "cost of service study" as a joint project with Austin and independent expert rate consultants under contract wherein a cost of service rate methodology is developed through a collaborative stakeholder process and then used in subsequent years for the development of each current Fiscal Year's cost of service rate *MODEL*. The applicable cost of service rate study continues to be the basis of the cost of service rate model in every fiscal year until a new cost of service study is developed through a similar partnership between Austin and independent expert rate consultants.**

The City of Austin did not complete a cost of service rate study, for the so called “Retail Water and Wastewater Customers of the River Place Water and Wastewater Systems.” No such customer class exists among the ratepayers of Austin Water Utility. The Austin City Council took no action with respect to the so called “Retail Water and Wastewater Customers of the River Place Water and Wastewater Systems” in connection with any rate setting for Fiscal Year 2013-2014 or Fiscal Year 2014-2015.

Prepared by or under the direct supervision of: David A. Anders

Clearly, Austin was asserting that it did not perform a *separate* cost of service study for this petitioner group. Austin was not required to do so for two primary reasons: (1) Austin was not required by any regulation or statute, a separate cost of service study for these Petitioners in order to prescribe just and reasonable rates; and (2) these Petitioners do not represent a particular class of customers for which a separate cost of service study was required. There is a third reason why Austin did not perform a separate cost of service study and that reason is that the rates that Austin has charged the Petitioners were *agreed to* by the legal representatives of the Petitioners—the River Place Municipal Utility District—in the *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*, fully executed as of September 7, 2009. Therefore, the rates were actually set pursuant to a contract with Petitioners’ legal predecessor in interest.

Moreover, the ALJs have already rejected Petitioners’ assertion that a separate cost of service study is needed for the River Place residents, stating in SOAH Order No. 6:

There was no persuasive argument that a separate cost-of-service study is required for this subset of City customers formerly served by the District. Because the City has a formalized process that it uses to set rates for all of its customers, there is no evidence or persuasive argument that the rates are inherently unjust or unreasonable. Accordingly, Petitioners failed to make a

required showing that the rate increases at issue in this proceeding could result in unjust or unreasonable rates. See, SOAH Order No. 6, p. 11

Again, Petitioners did not appeal this determination in SOAH Order No. 6, which also included a complete hearing schedule, so this ruling must govern the remainder of this contested case hearing.

Petitioners' allegations about a historical "test year" also mischaracterized Austin's discovery responses. First, the Petitioners cite P.U.C. Subst. R. §24.31(a)(b) pertaining to components of cost of service and allowable expenses as if Austin was required to have followed those regulations prior to the filing of this case. As stated herein, Chapter 24 is only guidance to the PUC on how it would review the evidence of what Austin ultimately presents, to prove that its rates are just and reasonable. Austin cannot be held to lose this case before any evidence is presented because its rate making practices do not follow the letter of a specific and inapplicable PUC substantive rule. The evidence presented may finally determine how the PUC uses Chapter 24 as "guidance" to decide the ultimate fact questions in this case. Secondly, Austin's *actual* response to the PUC Staff's RFI Request 1-4 was as follows:

Staff 1-4 Please state the test year the City used to set the appealed rates and indicate whether it is historical, budgeted or other.

Response: **Austin is unable to answer this question until such time as the Administrative Law Judges in this case accept jurisdiction and define the terms and the matters at issue in this retail rate appeal.**

Austin has not used a historical "test year" in the development of its cost of service water and wastewater rates. Austin has used a process where rates are projected for the coming fiscal year using budget data and financial, or revenue, forecast models. The validity of its budgeting and financial forecast models are verified using some known historical costs from the previous fiscal year.

Prepared by or under the direct supervision of: David A. Anders

Unless and until the ALJs determine that the PUC has original, rather than appellate jurisdiction over this case, a reference to a “test year” is premature. Moreover, Austin continues to assert that the PUC has no jurisdiction over the November 1, 2014 rate change. Therefore, the definition and scope of “the appealed rates” in the question does not clearly identify a valid ratemaking period.

IV. RESPONSE TO SECOND GROUND FOR PARTIAL SUMMARY DECISION

Petitioners have asserted that Austin’s failure to provide the Petitioners with sufficient notice of the October 1, 2014 rate change renders it a nullity. The ALJs have ruled in Order No. 6 that Austin’s September 8, 2014 notice to the former River Place ratepayers adequately complied with §13.043(i) of the Texas Water Code and 16 Texas Administrative Code §24.22(b). Petitioners did not file a timely appeal to this ruling. Therefore, Austin need not respond further to Petitioners’ assertion that the October 1, 2014 rate change was a nullity based in deficient notice. That assertion has been overruled by Order No. 6.

V. RESPONSE TO PETITIONERS’ ASSERTIONS REGARDING NOVEMBER 1, 2014 RATE CHANGE

In Order No. 6 the ALJs specifically rejected Petitioners’ assertions that the PUC has jurisdiction to consider the November 1, 2014 rate change because the group of former River Place ratepayers that Petitioners purport to represent are distinct from other environs customers because: (1) they experienced a rate change of a different magnitude or rate structure than other environ customers; (2) the October 2014 rates were nullified; or (3) they own their own water and wastewater systems. Austin concurs with the ALJs’ analysis regarding Petitioners’

allegations on those points. No party appealed those rulings contained in Order No. 6. Therefore, Austin need not respond further to Petitioners' similar assertions raised in their Motion for Summary Disposition.

Austin notes that Petitioners gratuitously attempted to prove a point about River Place Water and Wastewater Systems that is particularly irrelevant. Using non-summary judgment evidence that was neither authenticated nor self-proving¹, Petitioners tried to show that River Place Wastewater System still exists; and that a *nonparty*, River Place Municipality Utility District ("MUD"), still holds an active Certificate of Convenience and Necessity for the public water system. Petitioners further asserted the applicability of the Strategic Partnership Agreement between Austin and *nonparty*, River Place MUD. These observations are irrelevant to any issue in this case in which River Place MUD is not a party.

Petitioners did, however, provide the ALJs with an admission that is relevant to the PUCs jurisdiction over the November 1, 2014 rate change. At p. 9 of their Motion for Partial Summary Decision, Petitioners included the following table:

		Old River Place MUD Rates	11/1/14 City of Austin Rates
WATER	BASE	\$30.00 <i>(Correct amount may be \$31.00)</i>	\$9.75-\$20.25
	0-2,000 gal	\$0.00	\$3.12
	2,001-6,000 gal	\$2.50	\$4.68
	6,001-11,000 gal	\$2.50	\$7.48
	11,001-20,000 gal	\$2.50	\$11.22
	Over 20,000 gal	\$3.50-\$7.00	\$14.12
WASTEWATER	BASE	\$0.00	\$10.30
	Per 1,000 gals	\$3.14	\$4.51-\$9.13

See, Petitioners' Motion for Summary Decision, p. 9.

¹ Summary Judgment evidence must be admissible under TRCP 166a(f) and *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex.1997).

This table in Petitioners' Motion correctly sets out the rates that are charged to River Place residents and all City of Austin environs customers, and corrects the erroneous table that Austin attached to its September 8, 2014 notice to the former River Place Water and Wastewater Systems ratepayers². In Order No. 6, the ALJs noted what appeared to be higher rates for the former River Place customers than for other environs customers, and concluded that the apparently higher rates charged to the former River Place ratepayers put them in a distinct class. Under the ALJs' analysis and ruling, the 360 signatures of the River Place residents on the Tex. Water Code, §13.043(c) Petition instituting this appeal constituted 10% of the "distinct class." On this basis, the ALJs concluded that Petitioners satisfied the jurisdictional requirement of Tex. Water Code, §13.043(c).

Austin appealed this ruling in SOAH Order No. 6 and has filed a motion for reconsideration of the Commission's denial of consideration of its appeal. Austin notes that the referenced table of rates in Petitioners' Motion for Summary Disposition does not agree with the River Place rates as attached to SOAH Order No. 6, which the ALJs asserted provided the jurisdictional basis for this appeal in Order No. 6.³ In including the chart on Page 9 of Petitioners' Motion for Partial Summary Decision, Petitioners *judicially admit* that the factual

² In this case, Petitioners calculate "Base" rates, which are a combination of the fixed meter charges and the monthly tiered minimum charge. Similarly, the Volumetric Charges are a combination of the Volume Unit Charges and the \$0.19 Water Revenue Stability Reserve Fund. Therefore, although the presentation of the calculations presented is different from Austin's notice, the rates are exactly the same as Austin asserted in its Appeal of SOAH Order No. 6.

³ As Austin has stated repeatedly:

It is undisputed that the total number of city retail customers who reside outside the corporate limits of Austin who are eligible to appeal (including the customers acquired from the River Place MUD) is as follows:

Water ratepayers: 11,240 (10% would require at least 1,240 signatures); and
Wastewater ratepayers: 5,109 (10% would require at least 511 signatures).

Consequently, the Petition does not meet the requirement of the signatures of 10,000 or 10 percent of those ratepayers whose rates have been changed and who are eligible to appeal under Subsection [13.043] (b).

basis used by the ALJs (but not asserted by any party) to find jurisdiction over the November 1, 2014 rate change is in error. The ratepayers of the former River Place Water and Wastewater Systems are not, in fact, actually paying the water and wastewater rates reflected in the rate table attached to Austin's September 8, 2014 notice. Therefore, they are not a part of a class separate from Austin's 11,240 environs customers. The petition which included only some 360 signatures of River Place Residents does not satisfy Tex. Water Code, §13.043(c).

VI. REQUESTED RELIEF

WHEREFORE, premises considered, the City of Austin requests that the ALJs DENY *Petitioners' Motion for Partial Summary Decision* and for such other and further relief as Austin may show itself entitled.

Respectfully submitted,


KAREN KENNARD,
City Attorney

ANNE MORGAN
Interim City Attorney

MARIA SANCHEZ
Assistant City Attorney

WEBB & WEBB
712 Southwest Tower
211 East Seventh Street
Austin, Texas 78767
Tel: (512) 472-9990
Fax: (512) 472-3183

By:


Gwendolyn Hill Webb
State Bar No. 21026300

Stephen P. Webb
State Bar No. 21033800
ATTORNEYS FOR CITY OF AUSTIN

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, US mail and/or Certified Mail Return Receipt Requested on all parties whose names appear on the mailing list below on this 5th day of June, 2015.

FOR THE PUBLIC UTILITY COMMISSION:

1701 N. Congress Avenue, 7th Floor
PO Box 13326
Austin, Texas 78711-3326
Via Electronic Upload

FOR THE ADMINISTRATIVE LAW JUDGES:

Honorable Lilo D. Pomerleau
Honorable William B. Newchurch
Administrative Law Judges
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701
Phone: 512-475-4993
Fax: 512-322-2061
Via Electronic Upload

FOR THE SOAH DOCKET CLERK:

Ms. Monica Luna, Docketing Clerk
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701
Phone: 512-475-4993
Fax: 512-322-2061
Via Electronic Upload

FOR PETITIONERS:

Mr. Randall B. Wilburn, Attorney at Law
3000 South IH 35, Suite 150
Austin, Texas 78704
Phone: 512-535-1661
Fax: 512-535-1678
rbw@randallwilburnlaw.com

FOR THE PUC STAFF:

Ms. Jessica Gray, Attorney – Legal Division
jessica.gray@puc.texas.gov
512-936-7228
Mr. Thomas L. Tynes- Legal Division
Thomas.tynes@puc.texas.gov
512-936-7297
Public Utility Commission of Texas
1701 N. Congress Avenue
PO Box 13326
Austin, Texas 78711-3326
Phone: 512-936-7228
Fax: 512-936-7268


GWENDOLYN HILL WEBB