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

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BEFORE THE
PUBLIC UTILITY COMMISSION
FILING CLERK

PUBLIC UTILITY COMMISSION

OF TEXAS

PETITIONERS' RESPONSE TO
THE CITY OF AUSTIN'S APPEAL OF SOAH ORDER NO. 7

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 their Response to the City of Austin's ("City") Appeal of SOAH Order No. 7 ("City's Second Appeal"), and in support thereof, would respectfully show the following:

I. INTRODUCTION AND BACKGROUND

1. The City filed the City's Second Appeal on June 5, 2015. Petitioners' response is due June 12, 2015, within five (5) working days of the City's filing of its appeal.¹ Petitioners have filed this response timely.

II. RELEVANT FACTS AND LAW

2. On September 7, 2009, the City became co-owner of the River Place Water and Wastewater Systems in accordance with the terms of the Strategic Partnership Agreement Between the City of Austin and River Place MUD.²
3. On October 1, 2014, the City took over operations and maintenance of the River Place Water and Wastewater Systems ("River Place Systems") from Severn Trent, a third party, private

¹ P.U.C PROC. R. 22.123(a)(4).

² See Strategic Partnership Agreement Between the City of Austin and River Place MUD.

66

operating company. With the River Place Systems, the City serves 1,047 water utility customers and 1,035 sewer utility customers.³

4. The same day that the City assumed responsibility for serving the Ratepayers via the River Place Systems, the City increase the retail water and wastewater rates charged to Petitioners to a rate unrelated to the cost of service for operating the River Place Systems.
5. The City again raised Petitioners' retail rates a month later on November 1, 2014.
6. The water and wastewater rates that the City charges affects the Ratepayers of the River Place Systems, and Petitioners reside outside of the City's corporate limits.⁴
7. The City provides water and wastewater services to the Petitioners through the River Place Systems, which the City owns, operates, and controls.⁵
8. On December 22, 2014, Petitioners filed their Petition⁶ challenging both the City's October 1, 2014 and November 1, 2014 rate increases of its water and wastewater services pursuant to TEX. WATER CODE § 13.043(b).⁷
9. Section 13.043(c) requires that a Petition be signed by the lesser of 10,000 or 10% of the customers whose rates have changed.⁸
10. The Petition included the signatures of 360 customers of the River Place Systems, which is more than the required 10% of the 1,047 water customers and 1,035 wastewater customers of the River Place Systems.

³ See Original Petition Appealing Retail Water and Wastewater Rates of the City of Austin and Motion for Interim Rates, December 22, 2014, at 2.

⁴ See City's Motion to Dismiss at 1 and Attachment 1 to Exhibit A to the Agreement for Water and Wastewater Service and Operations Management of Facilities between the City of Austin and the River Place Municipal Utility District at 12 ("2009 Water and Wastewater Agreement").

⁵ *Id.*; TEX. WATER CODE ANN. § 13.002(13).

⁶ The Petition's 360 signers is more than the required 10% of 1,047 water customers and 1,035 wastewater customers of the River Place Water and Wastewater Systems.

⁷ TEX. WATER CODE ANN. § 13.043(b)(3).

⁸ Tex. Water Code Ann. § 13.043(c).

11. Petitioners included in their Petition a request for interim rates as allowed by TEX. WATER CODE ANN. § 13.043(h).⁹
12. In their Petition, the Petitioners also challenged the sufficiency and timing of the notice of rate increase that the City claims it provided to Petitioner.
13. The Austin City Council, the governing body of the City, adopted Petitioners' October 2014 rates on September 9, 2013.¹⁰ The City did not mail notice to Petitioners until September 8, 2014, almost one full year after the City's governing body made its final decision on the rate change.
14. The City mailed notice of the City Council's September 8, 2014 decision to increase Petitioners' November 2014 rates on September 8, 2014.¹¹
15. The City mailed a different notice of the City Council's decision to increase all other out-of-City customers rates on September 26, 2014.¹² This notice included different rates than the notice sent to Petitioners.¹³
16. On January 27, 2015, PUC Staff referred the above-docketed case to the State Office of Administrative Hearings ("SOAH") to hear the appeal.
17. On February 23, 2015, the City filed a Motion to Dismiss the Petitioners' appeal ("City's Motion") asserting the Commission and SOAH lacked jurisdiction.
18. On March 2, 2015, pursuant to P.U.C PROC. R. 22.181(a)(2), Petitioners timely filed their response to the City's Motion. PUC Staff also filed a response on March 13, 2015.

⁹ Tex. Water Code Ann. § 13.043(h).

¹⁰ See Affidavit of Robert Rowan, City of Austin's Additional Jurisdictional Argument and Evidence, April 14, 2015, Exhibit B.

¹¹ *Id.*

¹² Order No. 6 at 8.

¹³ See Affidavit of Ron Bedinghaus, City of Austin's Additional Jurisdictional Argument and Evidence, April 14, 2015, Exhibit C, at 2.

19. On May 4, 2015, after a prehearing conference, the Administrative Law Judge's ("ALJs") denied the City's Motion to Dismiss, finding the Petitioners' petition appealing the October 1, 2014 and November 1, 2014 rate increases was valid and jurisdiction was proper. The ALJs issued Order No. 6 on May 6, 2015, finding the petition valid and jurisdiction proper.
20. The City filed its Appeal of SOAH Order No. 6 and Motion for Reconsideration on May 18, 2015 ("City's First Appeal").
21. Petitioners filed their response to the City's First Appeal on May 26, 2015.
22. The Public Utility Commission of Texas ("PUC" or "Commission") notified the parties on May 28, 2015 that it would not consider the City's First Appeal.
23. After the ALJs denied the City's Motion for Reconsideration in Order No. 7 Denying Motion for Reconsideration; Adopting Procedural Schedule; and Notice of Hearing ("Order No. 7"), the City of Austin again appealed to the Commission ("City's Second Appeal").
24. Petitioners filed this timely Response to the City's Second Appeal on June 12, 2015.

III. ARGUMENT

The City's Second Appeal is duplicative of the City's First Appeal, which was entitled City of Austin's Appeal of SOAH Order No. 6 and Motion for Reconsideration, as well as the City's Motion for Reconsideration of the Commission's Denial of the City of Austin's Appeal of SOAH Order No. 6. The City filed the latter just one day before the pleading that is the subject of this Response.¹⁴ At this point, the City is merely filing frivolous motion after motion in an attempt to unnecessarily run up litigation costs for Petitioners. Petitioners have responded to those aforementioned pleadings and, for judicial efficiency, incorporate those pleadings by reference as if set out in full.¹⁵ In short, the City's "fatal flaw" and "inadvertent mistake"

¹⁴ City's Second Appeal at 3-6.

¹⁵ Petitioners' Response to the City of Austin's Appeal of SOAH Order No. 6 and Motion for Reconsideration, May 26, 2015; Petitioners' Response to the City of Austin's Motion for Reconsideration of the Commission's Denial of the City of Austin's Appeal of SOAH Order No. 6, June 9, 2015.

arguments are not new information, do not change the ALJs' analysis, and do not divest this Commission or SOAH from subject matter jurisdiction that is proper in this case.

A. Ample Opportunity to Argue Jurisdiction

Despite the fact that the City has had multiple bites of the proverbial apple on the jurisdictional issue, the City now says that it did not have "ample opportunity" to refute the ALJs' alleged mistake in finding jurisdiction.¹⁶ The City had the same opportunities as the other parties, including an opportunity to make oral argument in a live hearing on May 4, 2015. It is absurd for the City to claim it has not had an opportunity to address jurisdiction. For the City to now argue that it was somehow wrong for the ALJs to reach their conclusion by a supposedly different reasoning than that the parties argued is equally absurd.¹⁷ The City of Austin had no problem stating that it "generally concurred" with the ALJs' other rulings with which it agreed, although those decisions were reached by a different rationale than argued by the parties.¹⁸

B. Listing of City Rates Not a Judicial Admission that the ALJs Erred

The City attempts to introduce a new spin on the same jurisdictional argument, now, claiming falsely that Petitioners made a "judicial admission" by including a column showing the City's rates in a table that Petitioners included in one of the Petitioners' prior pleadings.¹⁹ The Petitioners have certainly not admitted, judicially or otherwise, that the ALJs' reasoning was flawed. The complained of table in the Petitioners' Motion for Partial Summary Decision simply

¹⁶ City's Second Appeal at 6.

¹⁷ See *National Federation of Independent Business v. Sebelius*, 132 S.Ct 2566 (2012) (wherein Chief Justice Roberts writing for a 5-4 majority upheld the Patient Protection and Affordable Care Act ("Obamacare") on a basis not urged by the parties (and specifically denied by the Federal Government), i.e., that the healthcare mandate was a tax).

¹⁸ For example, although it appears the City has now acquiesced on the issue of whether the October 1, 2014 rate change was appealable, that was not always the case insofar as the City filed a Motion to Dismiss Petitioners' appeal of the October 2014 rates, specifically claiming the River Place Ratepayers did not experience a "rate change," they merely began experiencing the same rates as other customers. SOAH Order No. 6 at 6. Additionally, the City emphatically declared that, "Petitioners were provided individual written notice of the rates that were going to change on October 1, 2014 and November 1, 2014." City of Austin's Reply to Petitioners' Response to City's Motion to Dismiss for Lack of Jurisdiction at 8, emphasis added. The ALJs concluded that the City's notice of the October 1, 2014 increase did **not** in fact comply with the 60-day requirement, but met the minimum statutory requirements nonetheless. SOAH Order No. 6 at 7.

¹⁹ City's Second Appeal at 8.

repeats the City's rates based upon the erroneous information that the City provided Petitioners. In fact, not only does the City admit in a footnote to its pleading that the rates shown in Petitioners' table are different from Austin's noticed rates,²⁰ but the City also admits that the rate information provided to Petitioners was erroneous.²¹ In showing the City's rates as the City provided to Petitioners, Petitioners were not admitting that the Petitioners were paying the rates in the table. Nor were the Petitioners admitting that the rates in the table were the rate that the City noticed. Rather, the table was a simple comparison of the River Place MUD rates with the supposed City of Austin rates as of November 1, 2014, nothing more. Despite the City's new claim otherwise, Petitioners did not admit, factually or otherwise, that the ALJ's factual basis for finding jurisdiction in this matter was flawed.

C. City Admits Charging Rates Different Than Noticed

Importantly, the City admits that the rate schedule included in the City's September 6, 2014 notice, which triggered the Petition subject to this proceeding, was incorrect.

The ratepayers of the former [sic] River Place 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.²²

To be clear, the City openly argues that the rates included in the notice mailed to Petitioners were wrong and that the City is charging different rates in violation of TEX. WATER CODE ANN. § 13.043(i). Clearly, Petitioners are a unique class of customers. The City is either only charging Petitioners the rates included in the City's notice that was sent to Petitioners, which is different from all other out-of-City customers, or Petitioners are the only out-of-City customers that the City is charging a rate different than the City's noticed rates. Either way, the universe of customers eligible to appeal under TEX. WATER CODE ANN. § 13.043 is limited to the 1,047 water customers and 1,035 wastewater customers of the River Place Systems. The Petition included the signatures of 360 customers of the River Place Systems, which is more than the statutorily required 10%.

²⁰ See City's Second Appeal, FN 2, at 7.

²¹ City's Second Appeal at 8.

²² City's Second Appeal at 8.

D. Water Code Allows Individuals to Appeal City Rates

Without any legal support or elaboration, the City also insinuates that jurisdiction is improper because the Ratepayers of the River Place Systems are not a “statutorily cognizable group that has standing.”²³ This argument is also flawed. TEX. WATER CODE ANN § 13.043(d) provides:

In an appeal under Subsection (b) of this section, *each person receiving a separate bill is considered a ratepayer*, but one person may not be considered more than one ratepayer regardless of the number of bills the person receives. The petition for review is considered properly signed if signed by a person, or the spouse of a person, in whose name utility service is carried.²⁴

The ratepayers do not have to be an organized, formal “group” or be a political subdivision to sign a valid petition and request review of discriminatory rates. To require otherwise thwarts the concept of rate relief from unreasonable rates as set out in Chapter 13 of the Water Code. Chapter 13 provides various opportunities for individual persons – customers and ratepayers – as well as corporations of every different kind to appeal unjust and unreasonable utility rates. Neither Chapter 13 nor the implementing rules of the Commission create an associational standing “test” similar to TEX. WATER CODE ANN. § 5.115. Moreover, the City has proffered no evidence that the River Place Ratepayers do *not* each receive utility bills. On the contrary, in one of its earlier jurisdictional pleadings, attempting to prove the sufficiency of its public notice, the City attached a list of customers who received the notice and rate schedule.²⁵ This list includes many of the same people who are now appealing their rates. The City cannot consider the River Place Ratepayers as § 13.043(b)(3) “ratepayers” for purposes of notice but not for standing. Once again, the City is arguing at cross-purposes.

E. City Agreed to Procedural Schedule in Order No. 7

The City’s argument against the procedural schedule in Order No. 7 is disingenuous. As

²³ City’s Second Appeal at 9.

²⁴ TEX. WATER CODE ANN. § 13.043(d) (emphasis added).

²⁵ City of Austin Motion to Dismiss, February 23, 2015, Exhibit B, Attachment 2.

Order No. 7 clearly states, “*the parties agreed* to the following procedural schedule.”²⁶ Yet, the City now finds the same schedule to which it voluntarily agreed to be “legally flawed.”

F. City Knows Public Interest Test Does Not Apply to Retail Rate Cases

As part of its argument against Order No. 7, the City now claims that the Petitioners’ rate challenge is subject to the Public Interest Test, arguing that the procedural schedule “does not provide for a determination of the public interest.”²⁷ The City’s claim that the Public Interest Test applies to this retail rate case is also disingenuous.

The City did not bother to argue the applicability of the “Public Interest Test”²⁸ during the preliminary hearing when the City agreed to the procedural schedule. The City knows that the Third Court of Appeals judicially created the Public Interest Test, as applied to wholesale water and wastewater rate cases only, as part of that court’s March 2, 1994 decision in the *Fort Worth* case,²⁹ a rate appeal brought under TEX. WATER CODE ANN. § 13.043(f),³⁰ and its holding is *only* applicable to wholesale rate challenges brought under § 13.043(f). The Commission’s substantive rules also limit the applicability of that test to certain wholesale rate cases only.³¹

Conversely, the River Place Ratepayers’ petition is a retail rate challenge brought under TEX. WATER CODE ANN. § 13.043(b), *not* § 13.043(f). The Public Interest Test simply does not apply, and the City’s argument is another attempt to delay this proceeding and deprive Petitioners their statutory right to challenge the City’s unjust and unreasonable rates.

IV. SUMMARY

As previously urged, Petitioners are the only customers of the River Place Systems and the only customers eligible to appeal the City’s rates charged to the customers for these systems.

²⁶ SOAH Order No. 7 at 1.

²⁷ City’s Second Appeal at 10-11.

²⁸ See *Texas Water Commission and City of Arlington, Texas v. City of Fort Worth*, 875 S.W.2d 332 (Tex. App.--Austin 1994, writ denied) (the “Fort Worth case”).

²⁹ *Id.*

³⁰ *Id.*

³¹ See P.U.C. SUBST. R. 24.128.

More than the 10% of the required customers properly petitioned the Commission for review of the City's rates. The City has failed to show how the ALJs erred in finding the Commission has jurisdiction over this retail rate appeal brought by the customers of these stand alone systems.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Commission denies the City's Appeal of SOAH Order No. 7 and grant other such relief to which Petitioners may be entitled.

Respectfully submitted,

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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 11th of June 2015.



Randall B. Wilburn