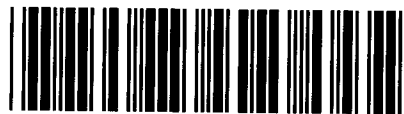




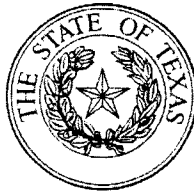
Control Number: 44485



Item Number: 32

Addendum StartPage: 0

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

November 30, 2015

**TO: Stephen Journeay, Director**  
**Commission Advising and Docket Management**  
**William B. Travis State Office Building**  
**1701 N. Congress, 7th Floor**  
**Austin, Texas 78701**

**Courier Pick-up**


**RE: SOAH Docket No. 473-15-3743.WS**  
**PUC Docket No. 44485**

***Ratepayers' Appeal of the Decision by the City of Wilmer to Change Water Rates***

Enclosed is the Proposal for Decision on Summary Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no jurisdictional deadline. Please notify me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

  
Lilo D. Pomerleau  
Administrative Law Judge

Enclosure

xc: All Parties of Record

**SOAH DOCKET NO. 473-15-3743.WS  
PUC DOCKET NO. 44485**

<b>RATEPAYERS' APPEAL OF THE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>DECISION BY THE CITY OF WILMER</b>	<b>§</b>	
<b>TO CHANGE WATER RATES</b>	<b>§</b>	<b>OF</b>
	<b>§</b>	
	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION ON  
MOTION FOR SUMMARY DECISION**

**I. INTRODUCTION**

On February 24, 2015, Joseph Aldrich, on behalf of 12 ratepayers living outside the city limits of the City of Wilmer (Ratepayers), filed an appeal with the Public Utility Commission of Texas (Commission) of an increase in water rates adopted by the Wilmer City Council on November 20, 2014. On May 7, 2015, the Commission referred the appeal to the State Office of Administrative Hearings (SOAH). The SOAH Administrative Law Judge (ALJ) established a procedural schedule, setting deadlines for prefiled testimony and a date for the hearing on the merits. On June 19, 2015, the Commission issued its Preliminary Order in this matter.

The City of Wilmer (City) did not file direct testimony by August 26, 2015, the deadline set out in Order No. 2. On October 7, 2015, Commission Staff filed a motion for summary decision (Motion). The City did not file a reply, although it indicated that it was not opposed to Staff's Motion.<sup>1</sup>

The ALJ grants Staff's Motion and finds that Staff is entitled to a decision in its favor as a matter of law. Accordingly, the hearing on the merit set for December 2, 2015, is canceled.

---

<sup>1</sup> Commission Staff's Response to the Direct Testimony of Ratepayers (Attachment A) (Oct. 26, 2015).

## II. JURISDICTION

On February 24, 2015, Ratepayers timely appealed the City's decision to increase water rates. According to a Staff memorandum dated April 29, 2015, at the time of the appeal, the City had 17 residential customers and nine commercial customers who received water service. Staff concluded that Ratepayers met the 10% requirement found in Water Code § 13.043(b).<sup>2</sup> The Commission ALJ deemed the application to be administratively complete. The Commission has jurisdiction and authority over this matter pursuant to Texas Water Code § 13.043 and 16 Texas Administrative Code 24.41(b).

## III. HISTORY OF CITY RATE CHANGE

On November 20, 2014, the Wilmer City Council adopted Ordinance 14-1120A (Rate Ordinance), an increase in water and sewer rates.<sup>3</sup> Although the Rate Ordinance increased water and sewer rates, Ratepayers' petition only referenced an appeal of water rates. Thus, the Commission's jurisdiction in this matter applies only to the Rate Ordinance's water rates. Section 3 of the Rate Ordinance provides that: "Water and/or sewer customers outside the city limit[s] and receiving water and/or sewer service from the City of Wilmer shall be charged double the established in city rates."<sup>4</sup> The City admitted that it did not send notice of the rate changes to its customers but an "Ordinance caption was published in [the] newspaper Nov. 27, 2014."<sup>5</sup> The effective date of the rate change for customers residing inside the city limits was January 1, 2015. However, the City stated that, due to encoding error, the rate change

---

<sup>2</sup> Commission Staff's Response to Order No. 2 and Request for Referral to the State Office of Administrative Hearings (Memorandum) (Apr. 30, 2015).

<sup>3</sup> The rates adopted by the City are found on Attachment A to this Proposal for Decision on Motion for Summary Decision.

<sup>4</sup> Commission Staff's Motion for Summary Decision, Attachment A at Bates 18.

<sup>5</sup> Commission Staff's Motion for Summary Decision, Attachment A at Bates 14.

was never implemented for customers outside the City.<sup>6</sup> Also, the City did not provide written notice of the rate change to customers residing outside the City boundaries.

#### IV. STAFF'S MOTION FOR SUMMARY DECISION

##### A. Staff's Recommendation and Parties' Responses

Staff recommends that the water rates for the customers living outside the City's corporate limits be set to the prior rates approved by the City. Staff notes there is no evidence supporting the proposition that it costs the City more to serve customers living outside the City limits than it does to serve customers living within the City limits.

As stated previously, the City is not opposed to Staff's Motion. Ratepayers state that they "fully support Staff's motion."<sup>7</sup> However, Ratepayers take issue with Staff's statement in the Motion asserting that Ratepayers failed to file direct testimony. Ratepayers note that they filed direct testimony on the deadline, but the Commission's Central Records did not accept the filing and Ratepayers were not notified because there was an error in the Ratepayers' email address.<sup>8</sup> Ratepayers also disagree with Staff's recommendation that refunds and surcharges are not appropriate. Ratepayers contend refunds are appropriate because the rates are unreasonable, preferential, prejudicial, or discriminatory. This issue is addressed below.

The ALJ concurs with Staff that it is appropriate for the Commission to order the City to charge its ratepayers/customers outside the City's corporate limits the rates that were in existence before the Rate Ordinance.

---

<sup>6</sup> *Id.*

<sup>7</sup> Ratepayers' Response to Staff's Motion for Summary Decision (Oct. 27, 2015) at 1.

<sup>8</sup> The ALJ concurs with Ratepayers that, while technically Ratepayers did not timely file their direct testimony, they attempted to do so in good faith. Ratepayers also assert that the City failed to give them proper and adequate notice of the rates currently in effect (the rates that Staff recommends be adopted herein). However, Ratepayers concede that no appeal of those rates was timely filed.

The following discussion addresses the Commission's Preliminary Order issues.

**B. Preliminary Order Issues**

**1. Issues Relating to Jurisdiction**

**Issue No. 1: Did the petition appealing the rate change by the City of Wilmer follow the requirements of Texas Water Code (TWC) § 13.043(b), (c), and (d); 16 Tex. Admin. Code (TAC) § 24.41(b), (c), and (d); and 16 TAC § 24.42(a) and (b)?**

- (a) Was the petition filed within 90 days after the effective date of the rate change? TWC § 13.043(c) and (d) and 16 TAC § 24.41(b).**
- (b) What number of ratepayers had their rates changed pursuant to TWC § 13.043(c) and (d) and 16 TAC § 24.41(d)?**
- (c) Did the lesser of 10,000 or 10% of those ratepayers file valid protests to the City of Wilmer's rate change pursuant to TWC § 14.043(c) and 16 TAC 24.41(b)?**

The City is a municipally-owned utility. Twelve eligible ratepayers out of 26, which is more than 10% of ratepayers living outside the City limits, appealed the proposed rate change.<sup>9</sup> Pursuant to Texas Water Code § 13.043(c), the appeal was filed on February 24, 2015, which is within 90 days after the January 1, 2015 effective date of the rate change.

**2. Issues Concerning the Reasonableness of the Rates**

**Issue No. 2: Considering only the information available to the governing body, what are the just and reasonable rates for the City of Wilmer that are sufficient, equitable, and consistent in application to each customer class and that are not unreasonable preferential, prejudicial, or discriminatory pursuant to § 13.043(c) and (j) and 16 TAC § 24.41(e) and (i)?**

---

<sup>9</sup> Commission Staff's Response to Order No. 2 and Request for Referral to the State Office of Administrative Hearings (Memorandum) (Apr. 30, 2015).

- (a) What is the appropriate methodology to determine just and reasonable rates for the City of Wilmer?
- (b) What is the revenue requirement that would give the City of Wilmer sufficient funds to provide adequate retail water service?
- (c) What is the appropriate allocation of the revenue to customer classes?
- (d) What is the appropriate design of rates for each class to recover the City of Wilmer's revenue requirement?

**Issue No. 3: What are the reasonable expenses incurred by the City of Wilmer in this proceeding? TWC § 14.043(e) and 16 TAC § 24.41(e)(2)?**

- (a) Should the Commission allow recovery of these reasonable expenses?
- (b) If so, what is the appropriate recovery mechanism?

Staff notes that, for any proposed change of rates, the burden of proving the rates are just and reasonable rests on the utility.<sup>10</sup> The City failed to file direct testimony or respond to Staff's second and third sets of discovery requests. The City failed to make a showing that its rates are reasonable and not preferential, prejudicial, or discriminatory, as required by 16 Texas Administrative Code § 24.41(i). Staff contends that, because the rates charged to ratepayers living outside the City's corporate limits that are double those charged to ratepayers living inside the City's limits, they are discriminatory absent a showing otherwise.

As stated above, Staff suggests that—for ratepayers residing outside the City's corporate limits—the rates charged should be those in effect before the Rate Ordinance. Staff argues those rates were set based upon a revenue requirement that is not subject to appeal. Such rates are as follows:

Base rates (including 0 to 2,000 gallons): \$12.00  
Volumetric rate (per 1,000 gallons, after the first 2,000 gallons): \$4.00.

---

<sup>10</sup> 16 Tex. Admin. Code § 24.12.

Concerning any rate case expenses, Staff notes that the City did not present any evidence regarding expenses incurred in this case and did not make any request for recovery of rate case expenses. Thus, Staff recommends that no expenses be deemed reasonable or recoverable from customers.

The ALJ concurs with Staff's recommendations. On issues concerning the City's rates charged to ratepayers living outside the City's corporate limits, Staff is entitled to summary decision because the pleadings, affidavits, discovery materials, and admissions show there is no genuine issue as to any material fact at issue.

### **3. Effective Date of Rate Change**

**Issue No. 4: What is the appropriate effective date of the rates fixed by the Commission in this proceeding, pursuant to TWC § 14.043(e) and 16 TAC § 24.41(e)(3)?**

Staff recommends that the effective date of the rates be the first billing cycle following the Commission's final order. Staff further recommends that any final order in this proceeding include an ordering paragraph that requires any Texas Water Code § 13.043 appeal of the City's rates, filed within one year, be referred to SOAH and that interim rates be established at rates set by the Commission. The ALJ concurs with Staff's suggestions.

### **4. Refunds**

**Issue No. 5: If the Commission establishes rates different than the rates set by the City of Wilmer, should the Commission order refunds or allow surcharges to recover lost revenues? If so, what is the appropriate amount and over what time period should the refund or surcharge be in place, pursuant to TWC § 14.043(e) and 16 TAC § 24.41(e)(4)?**

Staff contends that refunds and surcharges are not appropriate in this matter because the City has not yet billed the outside city customers under the appealed ordinance. Although



Ratepayers suggest that a refund is appropriate because the rates adopted on November 20, 2014, were preferential, prejudicial, or discriminatory, there is no evidence that any ratepayer living outside the City has been charged the new rates, or any rates that are double the rates of those charged to ratepayers living within the City limits.<sup>11</sup> Rather, the evidence indicates that the City never did implement the new rates for those customers/ratepayers living outside the City's corporate limits.

Because there is no evidence that Ratepayers have ever had to actually pay the rates adopted in the Rate Ordinance, there is no need for a refund. The ALJ finds Staff is entitled to summary decision on this issue because the pleadings, affidavits, and materials obtained in discovery show there is no genuine issue as to any material fact on this issue.

#### **V. PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERING PARAGRAPHS**

##### **A. Findings of Fact**

1. The City of Wilmer, Texas (City) is a municipal corporation home-rule city operating under the Texas Constitution and Texas Local Government Code §§ 9.001-.008.
2. The City provides water and sewer services to ratepayers living within and outside the City's corporate city limits.
3. On November 20, 2014, the City Council adopted Ordinance No. 14-1120A (Rate Ordinance) that increased water and sewer rates charged to ratepayers, including ratepayers that live outside the City limits.
4. The Rate Ordinance was scheduled to take effect on January 1, 2015.
5. The City did not provide notice of this rate increase to its ratepayers living outside the city limits.

---

<sup>11</sup> See Commission Staff's Motion for Summary Decision, Attachment B at Bates 27-28. Ratepayers did not provide any bills to Commission Staff during discovery and Ratepayers stated that they did not represent any outside-the-city ratepayers whose rates changed as a result of Ordinance No. 14-1120A.

6. The City never charged ratepayers living outside the City's corporate limits the rates adopted in the Rate Ordinance.
7. The Rate Ordinance provided that the rates for water and/or sewer customers living outside the City's corporate limits who receive water and/or sewer service from the City be double the rates charged for customers living within the City's corporate limits.
8. On February 24, 2015, 12 ratepayers living outside the City's corporate limits (Ratepayers) filed an appeal of the water rates contained in the Rate Ordinance with the Public Utility Commission of Texas (Commission).
9. At the time of the appeal, the City had 26 customers living outside the City's corporate limits.
10. On May 7, 2015, the Commission referred this matter to the State Office of Administrative Hearings (SOAH).
11. On June 17, 2015, SOAH Administrative Law Judge Lilo D. Pomerleau issued Order No. 2, adopting a procedural schedule, which included a deadline for filing prefiled direct testimony and a date for the hearing on the merits.
12. On June 19, 2015, the Commission issued its Preliminary Order.
13. The City failed to timely file direct testimony or file a response to Commission Staff's second or third set of requests for information.
14. On October 7, 2015, Staff filed a motion for summary decision.
15. The City filed no reply to Staff's motion for summary decision.
16. Ratepayers filed a reply which supports Staff's motion for summary decision.
17. There is no evidence to support charging ratepayers who reside outside the City's corporate limits double the rates that the City charges its customers/ratepayers residing within the City limits.
18. The rates adopted in the Rate Ordinance are unreasonably preferential in favor of ratepayers who reside inside the City's corporate limits, and discriminatory and prejudicial against City ratepayers residing outside the City's corporate limits.
19. The City did not present evidence of reasonable expenses incurred in this matter and did not seek recovery of any rate case expenses.

20. It is reasonable for the City to charge the following water rates to its customers residing outside the City limits:

Base rates (including 0 to 2,000 gallons): \$12.00

Volumetric rate (per 1,000 gallons, after the first 2,000 gallons): \$4.00.

**B. Conclusions of Law**

1. On September 1, 2014, subject matter jurisdiction over water and wastewater rate cases was transferred to the Commission. Act of May 25, 2013, 83<sup>rd</sup> Leg., R.S., ch 171 (S.B. 567), § 13, eff. Sept. 1, 2013.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Water Code § 13.041; Tex. Gov't Code ch. 2003.
3. The ratepayers of a municipally-owned utility residing outside the corporate limits of that municipality may appeal a decision affecting their water and sewer rates to the utility commission. Tex. Water Code § 13.043(b).
4. An appeal under Texas Water Code § 13.043(b) must be initiated by filing a petition for review with the utility commission within 90 days after the effective day of the rate change, and the petition must be signed by the lesser of 10,000 or 10% of those ratepayers whose rates have been changed and who are eligible to appeal. Tex. Water Code § 13.043(c).
5. Ratepayers met the requirements to appeal under Texas Water Code § 13.043(c) by gathering signatures of at least 10% of affected ratepayers. Tex. Water Code § 13.043(b), (c).
6. The City bears the burden of proof to establish that the contested rates are just and reasonable. 16 Tex. Admin. Code § 24.12.
7. A utility's rates must be just and reasonable; not be unreasonably preferential, prejudicial, or discriminatory; and be sufficient, equitable, and consistent in application to each class of customers. Tex. Water Code § 13.043(j); 16 Tex. Admin. Code § 24.41(i).
8. The City failed to meet its burden of proof to show that the rates established under its Rate Ordinance are just and reasonable and not unreasonably preferential, prejudicial, or discriminatory. 16 Tex. Admin. Code § 24.41(i).


9. Because the City did not impose the new rates on its ratepayers residing outside the City's corporate limits, a refund is not necessary.
10. Staff is entitled to summary decision because the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, and evidence of record show that there is no genuine issue as to any material fact. 16 Tex. Admin. Code § 22.182.

**C. Ordering Paragraphs**

In accordance with the above findings of fact and conclusions of law, the Public Utility Commission of Texas issues the following Order:

1. Beginning with the next billing cycle after this Order is issued, the City of Wilmer shall charge the following water rates to its customers living outside its corporate limits:  
  
Base rates (including 0 to 2,000 gallons): \$12.00  
Volumetric rate (per 1,000 gallons, after the first 2,000 gallons): \$4.00.
2. Any appeal of the City of Wilmer's rates pursuant to Texas Water Code § 13.043 that is filed within one year of the date of this Order shall be referred to the State Office of Administrative Hearings, and any interim rates shall be established at rates set by the Commission pending a final order.
3. All other motions, requests for entry of specific findings of fact and conclusions of law, and other requests for general or specific relief, if not expressly granted, are denied.

**SIGNED November 30, 2015.**



---

**LILLO D. POMERLEAU**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

## ATTACHMENT A

City of Wilmer Rates Subject to Appeal (Rates Not Implemented for Outside City Customers)				
	Residential	Apartment	Commercial	Mobile Home
<b><u>WATER</u></b>				
<b>Base Rate (including 2000 gallons)</b>	\$24.00	\$34.00	\$34.00	\$34.00
<b>Volumetric Rate</b>				
2001 – 5000 gallons	\$7.68	\$8.46	\$8.46	\$7.68
5001 – 10,000 gallons	\$8.46	\$9.60	\$9.60	\$8.46
10,000 – 100,000 gallons	\$8.84	\$10.00	\$10.00	\$8.84
Over 100,000 gallons	\$9.60	\$10.76	\$10.76	\$9.60
<b><u>SEWER</u></b>				
<b>Base Rate (including 2000 gallons)</b>				
.74 in. meter	\$24.00	n/a	\$34.00	n/a
1 in. meter	\$24.00	n/a	\$60.00	n/a
1.5 in. meter	n/a	n/a	n/a	\$34.00
2 in. meter	n/a	\$34.00	\$120.00	\$34.00
3 in. meter	n/a	n/a	n/a	\$34.00
6 in. meter	n/a	n/a	n/a	\$34.00
<b>Volumetric Rate (per 1000 gallons after first 2000 gallons)</b>	\$6.92	\$8.30	\$8.30	\$6.92