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DeAnn T. Walker  
Chairman

Brandy Marty Marquez  
Commissioner

Arthur C. D'Andrea  
Commissioner



Greg Abbott  
Governor

2018 MAR -8 PM 4:32  
PUBLIC FILING CLERK

**Public Utility Commission of Texas**

**TO:** DeAnn T. Walker, Chairman  
Brandy Marty Marquez, Commissioner  
Arthur C. D'Andrea, Commissioner

All Parties of Record

**FROM:** Jeffrey J. Huhn *JJA*  
Administrative Law Judge

**RE:** **Open Meeting of March 29, 2018**  
Docket No. 46955 – *City of Star Harbor Ratepayers' Appeal of the Decision by the City of Malakoff to Change Rates*

**DATE:** March 8, 2018

Enclosed is a copy of the Proposed Order in the above-referenced docket. The Commission is currently scheduled to consider this docket at an open meeting to begin at 9:30 a.m. on Thursday, March 29, 2018, at the Commission's offices, 1701 North Congress Avenue, Austin, Texas. The parties shall file corrections or exceptions to the Proposed Order on or before Wednesday, March 21, 2018.

**If there are no corrections or exceptions, no response is necessary.**

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**DOCKET NO. 46955**

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|----------------------------------|----------|----------------------------------|
| <b>CITY OF STAR HARBOR</b>       | <b>§</b> | <b>PUBLIC UTILITY COMMISSION</b> |
| <b>RATEPAYERS' APPEAL OF THE</b> | <b>§</b> |                                  |
| <b>DECISION BY THE CITY OF</b>   | <b>§</b> | <b>OF TEXAS</b>                  |
| <b>MALAKOFF TO CHANGE RATES</b>  | <b>§</b> |                                  |

**PROPOSED ORDER**

This Order addresses the petition of certain City of Star Harbor ratepayers (Star Harbor ratepayers) challenging the decision of the City of Malakoff (Malakoff) to increase wastewater rates effective January 1, 2017. Commission Staff and Malakoff both moved for dismissal. For the reasons discussed in this Order, the Star Harbor ratepayers' appeal is dismissed.

**I. Background**

On May 7, 1986, Malakoff and the City of Star Harbor entered into a Contract for Sewage Transportation and Treatment Service (contract), whereby Malakoff agreed to treat Star Harbor's sewage on a wholesale basis.<sup>1</sup> In the contract the two cities agreed Malakoff would bill Star Harbor on a monthly basis, and Star Harbor would pay Malakoff on a monthly basis. Although the contract expired on May 7, 2016, Malakoff continues to treat Star Harbor's sewage on a wholesale basis, billing Star Harbor for services and receiving payment on a monthly basis. Malakoff passed and approved Ordinance No. 436 on August 1, 2016, establishing a new sewer rate structure to be effective January 1, 2017.<sup>2</sup> Star Harbor received notice of the new rates on December 9, 2016.

On March 16, 2017, Star Harbor ratepayers filed a petition appealing the decision of Malakoff to increase wastewater rates. Prior to the passing of Ordinance No. 436, Star Harbor ratepayers were paying an outside the city limit wastewater rate of \$10.43 per connection per month. The new rate structure set an outside the city limits minimum wastewater rate of \$47.50 plus an additional \$14.04 per each additional 1,000 gallons.<sup>3</sup> The Star Harbor ratepayers argue

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<sup>1</sup> City of Malakoff's Response to Petition and Motion to Dismiss for Lack of Standing and for Untimeliness at 2 (Apr. 17, 2017) (Malakoff Response).

<sup>2</sup> Petition to Appeal Rates Established by the City of Malakoff, Texas at 1 (Mar. 16, 2017).

<sup>3</sup> *Id.*

that the rates are not just and reasonable as required by Texas Water Code § 13.043(j).<sup>4</sup> The Star Harbor ratepayers stated that Ordinance No. 436 also mandates different treatment for Star Harbor ratepayers from other outside the city limits customers by charging a \$1,400 impact fee per new connection. In their petition, Star Harbor ratepayers requested a determination of whether the rate increase was reasonable and just.

On April 17, 2017, Malakoff filed a motion to dismiss the petition on the basis that Star Harbor ratepayers lack standing to appeal the rate increase. Malakoff argues that there is no statute in the TWC and no regulation in the Commission's rules that enables a ratepayer of a retail provider to challenge the wholesale wastewater rates charged by a wholesale provider to the ratepayer's retail provider.<sup>5</sup> Malakoff points out that none of the Star Harbor ratepayers are retail wastewater customers of Malakoff, that Malakoff provides wastewater treatment service to Star Harbor on a wholesale basis, Malakoff does not have a service agreement with any Star Harbor retail wastewater customers, Malakoff does not read meters of Star Harbor retail wastewater customers or invoice or receive payments from Star Harbor retail wastewater customers.<sup>6</sup> In this instance it is Star Harbor who is the wholesale customer of Malakoff. Star Harbor could have demonstrated standing had Star Harbor elected to challenge Malakoff's decision to change rates.

The Star Harbor ratepayers disagree with Malakoff and assert they are entitled to bring this petition under TWC § 13.043(b)(3) which grants the Commission appellate jurisdiction over retail water and or sewer rates set by a municipality charged to its out of city customers. The Star Harbor ratepayers contend that Malakoff's provision of sewer service to ratepayers qualifies as a provision of "retail sewer utility service."<sup>7</sup> However, none of the Star Harbor ratepayers who signed the petition are retail wastewater customers of Malakoff. The Star Harbor ratepayers are in fact retail wastewater customers and ratepayers of Star Harbor and do not have a contractual relationship with Malakoff. Star Harbor ratepayers do have service agreements and receive monthly retail sewer service bills from Star Harbor; and it is to Star Harbor the ratepayers remit their monthly payments.

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<sup>4</sup> Tex. Water Code Ann. § 13.043(j) (West 2008 & Supp. 2017) (TWC).

<sup>5</sup> Malakoff Response at 3.

<sup>6</sup> Id. at 8-9 (Affidavit of Tim Whitley).

<sup>7</sup> Ratepayers of the City of Star Harbor's Reply to the City of Malakoff's Response to Petition and Motion to Dismiss for Lack of Standing and for Untimeliness (May 9, 2017).

Under 16 Texas Administrative Code (TAC) § 22.103(b)(1), a person has standing if the person has a right to participate that is expressly conferred by statute, Commission rule, or other law. The ratepayers have no expressly conferred standing in this case. Any relief to which the ratepayers are entitled would be available from Star Harbor, not Malakoff.

Commission Staff recommended dismissal of the ratepayers' appeal under 16 TAC § 22.181(d)(1) and (8).<sup>8</sup> Staff stated that under 16 TAC § 22.103(b)(1), a person has standing if the person has a right to participate that is expressly conferred by statute, Commission rule, or other law. Because the Star Harbor ratepayers are not ratepayers of Malakoff they have no expressly conferred standing in this case.<sup>9</sup>

The Commission adopts the following findings of fact and conclusions of law:

## II. Findings of Fact

1. On March 16, 2017, Star Harbor ratepayers filed a petition appealing the decision of the City of Malakoff to increase wholesale wastewater rates effective January 1, 2017.
2. On March 21, 2017, Order No. 1 was issued requiring comments on administrative completeness of the application, requiring comments and recommendations on how the application should be processed and requiring a procedural schedule.
3. On April 17, 2017, the City of Malakoff responded to Order No. 1, disputing the validity of the ratepayers' appeal and requesting dismissal.
4. On May 12, 2017, the City of Malakoff filed a supplement to the motion to dismiss.
5. On May 31, 2017, Commission Staff recommended the petition be deemed administratively complete.
6. On June 5, 2017, Order No. 4 was issued deeming the application administratively complete.
7. On June 7, 2017, Commission Staff filed a motion for reconsideration of Order No. 4 and amended its recommendation on administrative completeness.

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<sup>8</sup> Commission Staff's Response to the City of Malakoff's Motion to Dismiss (Jun. 8, 2017).

<sup>9</sup> *Id.* at 2.

8. On June 8, 2017, Commission Staff recommended that the petition be declared insufficient and should be dismissed as required under 16 TAC § 22.181(d)(8).
9. On June 13, 2017, Order No. 5 was issued, granting the motion for reconsideration and deeming the application insufficient.

**Description of Wastewater Services**

10. On May 7, 1986, Malakoff and Star Harbor entered into a contract for Malakoff to treat Star Harbor's sewage on a wholesale basis. Under the contract, Malakoff billed Star Harbor on a monthly basis and Star Harbor paid Malakoff on a monthly basis.
11. The contract expired on May 7, 2016, but Malakoff continues to treat Star Harbor's sewage, bill Star Harbor on a monthly basis, and receive payment from Star Harbor.
12. On August 1, 2016, Malakoff adopted Ordinance No. 436. The ordinance amended the wholesale wastewater rates and impact fees charged by Malakoff to Star Harbor.
13. Malakoff began charging the new wholesale wastewater rates to Star Harbor on January 1, 2017.
14. Malakoff does not provide retail wastewater services to any of the individuals listed as a Star Harbor ratepayer at the address listed on the ratepayer list which was attached to the Petition.
15. Malakoff does not have service agreements with any of Star Harbor's retail wastewater customers for retail wastewater service that is provided by Star Harbor.
16. Star Harbor ratepayers are not ratepayers of Malakoff.

**III. Conclusions of Law**

1. Malakoff provides wholesale sewer service to Star Harbor consistent with TWC § 13.002(25).
2. Star Harbor ratepayers are not ratepayers of Malakoff under TWC § 13.043(b)(3) and therefore do not have standing to appeal Malakoff's rates.
3. Dismissal of the ratepayers' appeal of the sewer rate increase is proper under 16 TAC § 22.181(d)(1) and (8).

**IV. Ordering Paragraphs**

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders:

1. The Star Harbor ratepayers' petition is dismissed with prejudice.
2. All other motions and any other request for general or specific relief, if not expressly granted, are denied.

Signed at Austin, Texas the \_\_\_\_\_ day of March 2018.

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**DEANN T. WALKER, CHAIRMAN**

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**BRANDY MARTY MARQUEZ, COMMISSIONER**

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**ARTHUR C. D'ANDREA, COMMISSIONER**