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DOCKET NO. 46955

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CITY OF STAR HARBOR §
RATEPAYERS' APPEAL OF THE §
DECISION BY THE CITY OF §
MALAKOFF TO CHANGE RATES §

BEFORE THE PUBLIC UTILITY COMMISSION
PUBLIC UTILITY COMMISSION
CLERK
OF TEXAS

CITY OF MALAKOFF'S RESPONSE TO PETITION AND
MOTION TO DISMISS FOR LACK OF STANDING AND UNTIMELINESS

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BEFORE THE
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OF TEXAS

**CITY OF MALAKOFF'S RESPONSE TO PETITION AND
MOTION TO DISMISS FOR LACK OF STANDING AND FOR UNTIMELINESS**

The City of Malakoff ("Malakoff") files this Response to the Petition of the Ratepayers of the City of Star Harbor and Motion to Dismiss for Lack of Standing and Untimeliness (the "Response") in the above-referenced matter. Pursuant to Order No. 1 in this matter, Malakoff is required to file comments with the Public Utility Commission ("Commission") as to how this petition should be processed and to propose a procedural schedule by April 17, 2017. Thus, this Response is timely filed.

I. BACKGROUND

On May 7, 1986, Malakoff and the City of Star Harbor ("Star Harbor") entered into a certain Contract for Sewage Transportation and Treatment Service ("Contract"), whereby Malakoff agreed to treat Star Harbor's sewage on a wholesale basis. Under such Contract, the two cities agreed that Malakoff will bill Star Harbor on a monthly basis, and Star Harbor will pay Malakoff on a monthly basis. While the Contract terminated on May 7, 2016, Malakoff continues to treat Star Harbor's sewage on a wholesale basis, billing Star Harbor on a monthly basis and receiving payment from Star Harbor on a monthly basis.

On August 1, 2016, Malakoff adopted Ordinance 436, adopting in part amended wholesale wastewater rates (the "Rates") charged by Malakoff to Star Harbor. It is Malakoff's

understanding that Star Harbor received notification of the new rates on December 9, 2016.¹ The City commenced charging the new wholesale wastewater rates to Star Harbor on January 1, 2017.

On March 16, 2017, certain ratepayers of Star Harbor (collectively, the "Star Harbor Ratepayers") filed a petition ("Petition") with the Commission, pursuant to Texas Water Code ("TWC") § 13.043(b), to appeal these amended wholesale wastewater Rates. In response to the Petition, on March 21, 2017, the Administrative Law Judge ("ALJ") for the Commission issued Order No. 1 Requiring Responses and Addressing Other Procedural Matters. Malakoff now files this Response, and as discussed in more detail, herein, the Petition should be dismissed for both substantive and procedural reasons.

II. MALAKOFF'S RESPONSE AND MOTION TO DISMISS

A. Star Harbor Ratepayers Lack Standing to Appeal Malakoff's Wholesale Sewer Rates

The Star Harbor Ratepayers' Petition should be denied on the straightforward, substantive basis that the Star Harbor Ratepayers lack standing to appeal the Rates. There is no statute in TWC, Chapter 13, and no regulation in the Commission's rules in 16 Texas Administrative Code, Chapter 24, that enables a ratepayer of a retail provider to challenge the wastewater rates charged by a wholesale provider to the ratepayer's retail provider.

Here, the Star Harbor Ratepayers base their Petition upon TWC §13.043(b),² and, presumably, they are referring to TWC §13.043(b)(3). To the extent that the Petition is filed under TWC § 13.043(b)(3), the Legislature has only granted the Commission appellate jurisdiction over the retail water and/or sewer rates set by a municipality charged to its customers that are located outside its corporate limits, as provided below:

¹ Petition at 2 (Section 1) and 17 (Exhibit B).

² Petition at 2 (Section 1).

(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;³

However, fatal to the Petition, none of the Star Harbor Ratepayers that signed the Petition are retail wastewater customers of Malakoff at the listed corresponding addresses. An affidavit from Tim Whitley, Public Works Director of Malakoff supporting such contention, is attached hereto as Attachment A. Rather, the Star Harbor Ratepayers are retail wastewater customers/ratepayers of Star Harbor, and have no direct contractual relationship with Malakoff. Malakoff does not have service agreements with the Star Harbor Ratepayers; Malakoff does not issue monthly invoices to the Star Harbor Ratepayers; and the Star Harbor Ratepayers do not remit monthly payments to Malakoff.⁴ Rather, the Star Harbor Ratepayers have retail wastewater service agreements with Star Harbor, receive monthly retail sewer service bills from Star Harbor, and remit their monthly payments to Star Harbor. Further, the Petition acknowledges that Star Harbor is a wholesale customer of Malakoff, as it notes that Malakoff provided notice of the rate change to Star Harbor and not the individual Star Harbor Ratepayers.⁵

In other words, if the Star Harbor Ratepayers desire to protest their retail wastewater rates, they should file an appeal of the rates of their retail wastewater service provider – Star Harbor. Star Harbor, not Malakoff, sets rates to be charged to the Star Harbor Ratepayers, and Malakoff has no jurisdiction or control over how Star Harbor sets such rates. The Petition is clear that is filed by the Star Harbor Ratepayers, and, the Petition should be dismissed for a lack of standing.

³ TWC § 13.043(b)(West 2017).

⁴ Attachment A.

⁵ Petition at 17 (Exhibit B).

B. Star Harbor Ratepayers' Petition is Untimely

In addition, the Petition should be dismissed because it is untimely filed. Since the Rates are a wholesale rate, TWC § 13.043(f) is the applicable statute governing an appeal of a wholesale rate charged by a municipality to another municipality. To this end, TWC § 13.043(f) provides that "an appeal under this subsection must be initiated within 90 days after the date of notice of the decision is received from the provider of water or sewer service by the filing of a petition by the retail public utility." Here, as admitted by the Star Harbor Ratepayers in the Petition, Star Harbor received notice of the Rates on December 9, 2016.⁶ Accordingly, the deadline for Star Harbor to file a petition was March 9, 2017. The Petition, however, was filed by the Ratepayers of Star Harbor – not Star Harbor – on March 16, 2017, a week beyond the 90-day time frame provided by the statute. Consequently, the Petition should be dismissed as untimely.

III. PROCEDURAL SCHEDULE

Because Malakoff believes the Petition should be dismissed, it does not propose a procedural schedule at this time.

IV. SUBSTITUTION OF ATTORNEYS OF RECORD

Please add me to the mailing list for all correspondence pursuant to this matter and consider me the primary contact for the City. My contact information is as follows:

Mr. David Klein
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5818 (Phone); (512) 472-0532 (Fax)
dklein@lglawfirm.com

⁶ Petition at 17 (Exhibit B).

V. CONCLUSION AND PRAYER

For the reasons stated above in Section II, the City of Malakoff respectfully requests that the Public Utility Commission issue an order dismissing the City of Star Harbor Ratepayers' Petition in this matter with prejudice for lack of standing, or, in the alternative, for filing an untimely petition. The City of Malakoff further requests any and all other relief to which it is justly entitled.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE &
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ATTORNEYS FOR THE CITY OF MALAKOFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, hand-delivery and/or regular, first class mail on this 17th day of April 2017 to the parties of record.


David J. Klein

ATTACHMENT A
Affidavit of Tim Whitley

PUC DOCKET NO. 46955

CITY OF STAR HARBOR § PUBLIC UTILITY COMMISSION
RATEPAYERS' APPEAL OF THE §
DECISION BY THE CITY OF §
MALAKOFF TO CHANGE RATES § OF TEXAS

AFFIDAVIT OF TIM WHITLEY

STATE OF TEXAS §
§
COUNTY OF HENDERSON §

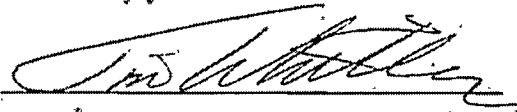
On this day, Tim Whitley, appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said:

“My name is Tim Whitley. I am the Director of Public Works of the City of Malakoff, Texas (“Malakoff”). I am more than 21 years of age and capable of making this affidavit. I have personal knowledge of the facts stated herein, which are true and correct.

1. I have reviewed the ratepayer list (“Ratepayer List”) attached to the “Petition to Appeal Rates Established by the City of Malakoff, Texas,” filed in Docket No. 46955 of the Public Utility Commission of Texas on March 16, 2017.
2. In my role as Public Works Director for Malakoff, I am familiar with and have access to Malakoff’s retail wastewater customer records.
3. I have compared the Ratepayer List with Malakoff’s retail wastewater service customer accounts, and none of the individuals listed in Ratepayer List are retail wastewater customers of Malakoff at the address listed on the Ratepayer List.
4. Malakoff does not provide retail wastewater services to any of the individuals listed on the Ratepayer List at the corresponding address listed on the Ratepayer List.

5. I am also familiar with the City of Star Harbor ("Star Harbor") and the provision of wastewater service by Malakoff to Star Harbor.
6. Malakoff provides wastewater treatment service to Star Harbor on a wholesale basis.
7. Malakoff issues a monthly invoice to Star Harbor for wholesale wastewater service provided, and Malakoff has been receiving a partial payment from Star Harbor for such service for many months.
8. 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.
9. Malakoff does not read the meters of Star Harbor's retail wastewater customers.
10. Malakoff does not invoice Star Harbor's retail wastewater customers for retail wastewater service that is provided by Star Harbor.
11. Malakoff does not receive payments from Star Harbor's retail wastewater customers for retail wastewater service that is provided by Star Harbor."

Further Affiant sayeth naught.


Tim Whitley, Public Works Director,
City of Malakoff

SUBSCRIBED AND SWORN TO BEFORE ME this 17th day of April, 2017.


Notary Public, State of Texas

[seal]

