



Control Number: 46998



Item Number: 17

Addendum StartPage: 0

DeAnn T. Walker
Chairman

Brandy Marty Marquez
Commissioner

Arthur C. D'Andrea
Commissioner



Greg Abbott
Governor

2018 MAR -8 PM 3:50

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. 46998 – *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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that the rates are not just and reasonable as required by Texas Water Code § 13.043(j).⁴ 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 27, 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.⁵ 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.⁶ 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."⁷ 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.

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

⁵ Malakoff Response at 3.

⁶ *Id.* at 14-15 (Affidavit of Tim Whitley).

⁷ 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).⁸ 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.⁹

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

II. Findings of Fact

Procedural History

1. On March 28, 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 29, 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 27, 2017, the City of Malakoff responded to Order No. 1, disputing the validity of the ratepayers' appeal and requesting dismissal.
4. On May 9, 2017, Star Harbor ratepayers filed a response to Malakoff's motion to dismiss.
5. On May 16, 2017, Malakoff filed a supplement to the motion to dismiss.
6. On June 7, 2017, Commission Staff recommended that the petition be declared insufficient and be dismissed.
7. On June 14, 2017, Order No. 4 was issued deeming the petition administratively incomplete.

⁸ Commission Staff's Recommendation on Administrative Completeness (Jun. 7, 2017).

⁹ *Id.* at 2

8. On August 18, 2017, Malakoff filed a second supplement to its motion to dismiss.

Description of Wastewater Services

9. 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.
10. 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.
11. 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.
12. Malakoff began charging the new wholesale wastewater rates to Star Harbor on January 1, 2017.
13. 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.
14. 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.
15. 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

DEANN T. WALKER, CHAIRMAN

BRANDY MARTY MARQUEZ, COMMISSIONER

ARTHUR C. D'ANDREA, COMMISSIONER