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DOCKET NO. 46998

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

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PUBLIC UTILITY COMMISSION

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ORDER

This Order addresses the petition of certain City of Star Harbor ratepayers challenging the decision of the City of 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, whereby Malakoff agreed to treat Star Harbor's sewage on a wholesale basis.¹ 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 treating 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, 2017.² Star Harbor received notice of the new rates on December 9, 2016.

On March 28, 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 a nonresident wastewater rate of \$10.43 per connection per month. The new rate structure set a nonresident minimum wastewater rate of \$47.50 plus an additional \$14.04 per each additional 1,000 gallons.³ The Star Harbor ratepayers argue that the rates are not just and

¹ City of Malakoff's Response to Petition and Motion to Dismiss for Lack of Standing and for Untimeliness at 1 (Apr. 27, 2017) (Malakoff Response).

² Ratepayers' Appeal of the Decision by the City of Malakoff to Change Rates at 1 (Mar. 28, 2017)

³ *Id*

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 nonresident 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, 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, and 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 with 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)

Commission Staff recommended dismissal of the ratepayers' appeal under 16 Texas Administrative Code (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 Any relief to which the ratepayers are entitled would be available from Star Harbor, not Malakoff.

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 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, comments and recommendations on how the application should be processed, and a procedural schedule.
3. On April 27, 2017, 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. On August 18, 2017, Malakoff filed a second supplement to its motion to dismiss.

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

⁹ *Id.* at 2

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 on a monthly basis.
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.
- 13A. Malakoff does not read meters for, directly bill, or receive payments directly from the Star Harbor ratepayers.
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 29th day of March 2018.

PUBLIC UTILITY COMMISSION OF TEXAS



DEANN T. WALKER, CHAIRMAN



BRANDY MARTY MARQUEZ, COMMISSIONER



ARTHUR C. D'ANDREA, COMMISSIONER

