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Docket No. 49154
SOAH Docket No. 473-19-5677.WS

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RATEPAYERS' APPEAL OF THE
DECISION BY LAGUNA MADRE
WATER DISTRICT TO CHANGE
RATES

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PUBLIC UTILITY COMMISSION
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OF TEXAS

**RATEPAYER SOUTH PADRE ISLAND GOLF COURSE'S BRIEF REGARDING THE
APPLICABILITY OF SECTION 49.2122 TO THIS PROCEEDING**

TO THE HONORABLE JUDGE SIANO AND JUDGE SOTO:

COMES NOW, **South Padre Island Golf Course ("SPI")**, and in response to
Signed SOAH Order No. 8 would respectfully show the following:

1. Section 49.2122 is Not Applicable to this Proceeding

Section 49.2122(b) of the Texas Water Code provides that "a district is presumed to have weighed and considered appropriate factors and to have properly established charges, fees, rentals, and deposits absent a showing that the district acted arbitrarily and capriciously." Tex. Water Code § 49.2122(b). The key term in determining the applicability of the above section is "district." Section 49.001 defines a district as "any district or authority created by authority of either Sections 52(b)(1) and (2) of Article III or Section 59 of Article XVI of the Texas Constitution." Tex. Water Code § 49.001.

Section 49.2122 is titled "Establishment of Customer Classes." Therefore, subsection (b) only creates a presumption that *customer classes*, as opposed to rates, are properly established absent a showing that the district action establishing the classes was arbitrary and capricious. There is precedent for this interpretation. In an Order signed by The Chairman for The Commission in an *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority*, the Commission held that

49.2122(b) only applies to customer classes. This conclusion of law is consistent with previous conclusions reached by The Commission in prior appeals. 2009 WL 2612226 (Tex. Com. Env. Qual.) (*finding 49.2122(b) does not create a presumption that the rates set by a district are properly established.*) The instant appeal by SPI is a dispute over a rate increase, not an establishment of a customer class. See, *Plaintiff's Second Amended Petition*. Thus, Section 49.2122(b) is not applicable to this proceeding.

2. Standard of Proof

Section 13.042 of the Texas Water Code sets out the standard of proof for an appeal to the utility commission over a rate increase. Subsection (j) provides that the utility commission will ensure every rate shall be just and reasonable. Further, the rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in application to each class of customer. Tex. Water Code § 13.043(j). These terms are not defined by the Water Code. However, the code provides examples that would make rates unjust or unreasonable. Something is “just” if it has a basis in or conforms to fact or reason, and something is “reasonable” if it is in accordance with reason and not extreme or excessive. SPI’s position has been consistent throughout this appeal, which is supported by the facts developed in discovery: The 89% water rate increases at issue were based upon a “revised” version of LMWD’s expert, Dan Jackson’s original 2018 rate study recommending raw water rates. Unlike the prior twenty-plus years, Mr. Jackson’s revised 2018 study involved a complete reallocation of costs, assets and associated depreciation. This reallocation was incredibly inconsistent with LMWD’s accounting records, the independent audit of its financial statements for 2018, and the deposition testimony of LMWD’s General

Manager and its three Directors of Finance, Engineering and Operations. It is SPI's position that the LMWD Board majority directly or impliedly instructed Mr. Jackson to revise his original 2018 rate study to exponentially raise the raw water rate charged to SPI. LMWD's General Manager and Directors of Finance, Engineering and Operations all testified they did not provide Mr. Jackson with any additional information after he presented the initial report of his rate study which recommended a rate dramatically lower than his final recommendation of \$1.04 per unit. Indeed, LMWD's Director of Operations (and former Director of Finance) testified that Mr. Jackson's line-item allocation of hundreds of fixed assets have absolutely no use in the supply/transmission of raw water, and using those assets to calculate the costs of raw water would be "unfair". In short, LMWD's rate increases were not based upon fact or reason, and the increases were extreme. The rate increases were unfair, unjust and discriminatory.

3. Laguna Madre Water District Bears the Burden of Proof

Section 49.2112 only places the burden of proof on the Appellant to challenge an establishment of a customer class. Since Section 49.2112 does not apply, the burden is on the Water District, LMWD, to show the rates established were just, reasonable, and not unreasonably preferential, prejudicial, or discriminatory.

4. SPI's Position on the Procedural Schedule

On January 15, 2019, the parties submitted a third agreement modifying procedural schedule. *See copy attached as Exhibit 1 for ready reference.* The third agreement extended all remaining deadlines by seven (7) days, except the final hearing dates of April 6-9, 2018. Barring any unforeseen circumstances, SPI does not believe any further modifications to the procedural schedule are needed. If, however, SOAH

and/or the Commission believe modifications to the schedule would be beneficial to a resolution of the issues on appeal, SPI is certainly agreeable to modifying the procedural schedule.

Respectfully submitted,

ROYSTON, RAYZOR, VICKERY & WILLIAMS, L.L.P.

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Certificate of Service

I hereby certify, that a true and correct copy of the above and foregoing document was served via facsimile, certified mail/regular U.S. first class mail, and/or e-mail upon the following counsel of record on this the 22nd day of January 2020.

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