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SOAH DOCKET NO. 473-19-5831.WS

PUC DOCKET NO. 49367

PETITION BY OUT OF DISTRICT	§	PUBLIC UTILITY COMMISSION
RATEPAYERS APPEALING THE	§	
WATER RATES ESTABLISHED BY	§	OF TEXAS
THE EL PASO WATER CONTROL	§	
AND IMPROVEMENT DISTRICT	§	
NO. 4	§	
	§	

**PETITIONERS' RESPONSE TO  
DISTRICT'S MOTION FOR FULL OR PARTIAL  
SUMMARY DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

**I. INTRODUCTION**

On January 1, 2019, out-of-district residential ratepayers' ("Ratepayers") minimum usage water and wastewater rates rose from \$92.71 to \$96.16 a month. Usage rates also escalated by 5%. Ratepayers challenged those rates as unsupported for two reasons: (1) the El Paso Water Control and Improvement District #4 ("the District") has no basis for charging out-of-district residential ratepayers a minimum usage rate of \$96.16, compared with the in-district ratepayers minimum usage rate of \$56.02 a month for the same service; and (2) the 5% increase for out-of-district ratepayers, amounting to a minimum increase of \$3.45/month, is not justified.

The District claims that the Public Utility Commission ("PUC") cannot review whether the rates implemented on January 1, 2019 are justified and seeks such a ruling. The District claims first that ratepayers are time-barred from appealing its decision to include a 74.9% differential in rates because it made the same decision in years prior. The District further asserts out-of-district ratepayers must collect signatures of in-district ratepayers in their petition because

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in-district ratepayers were also charged a 5% rate increase which raised their rates by only \$1.97 compared to the \$3.45 increase experienced by Ratepayers. Each of these arguments fail under the law. Ratepayers must appeal rate changes within 90 days of their effective date. This includes all aspects of the effective rate. Additionally, Ratepayers are permitted to appeal any *decision* made by the District that affects *their* rates. See Tex. Water Code §13.043(b). Moreover, forcing Ratepayers to include the signatures of in-district ratepayers would violate their constitutional right to counsel.

The PUC has the authority and duty to review whether the January 1, 2019 out-of-district rate of \$96.16 is factually supported and legally justified. If the District could support the rate it charges to Ratepayers, such contorted legal arguments would not be made. The PUC's legal obligation is to review the rates adopted January 1, 2019 for compliance with the law. Ratepayers have valid claims that were timely raise and supported by the requisite number of petition signatures. The PUC has jurisdiction to hear Ratepayers' claims; therefore summary disposition on the District's motion is inappropriate as a matter of law.

## **II. BACKGROUND**

The procedural claims raised by the District have already been decided. Ratepayers filed this appeal of the District's January 1, 2019 rate increase on March 22, 2019. Instead of responding to the substance of Ratepayers' claims, the District filed a motion to dismiss based on the same legal arguments advanced in its pending Motion for Summary Decision. Dckt. 7. Ratepayers and the PUC staff have already filed responses countering the District's procedural complaints. Dckt 13 and 14. After these filings, administrative Law Judge Steven Leary denied the District's motion to dismiss and deemed the Ratepayers' petition sufficient for further

processing. Dckt. 15. The District has now resurrected legal arguments already resolved by another officer, hoping that presentation before a new judge will provide a different outcome.

The facts in this case are undisputed and the District's motion for summary decision should be denied as a matter of law. On March 22, 2019, Ratepayers submitted signatures of more than 10% of out-of-district ratepayers appealing the implementation of monthly minimum usage rates of \$96.16 to out-of-district residential ratepayers. There is no dispute that Ratepayers submitted signatures of more than 10% of out-of-district ratepayers or that the petition for review was within 90 days of the implementation of new rates on January 1, 2019. There is also no dispute that the first time the District decided to implement a 74.9% rate differential between in and out-of-District ratepayers was in 2015. It is also undisputed that the District decided to continue its disparate rates between customer classes and chose to re-implement an escalating 74.9% minimum usage rate differential on January 1, 2019. Finally, there is no dispute that the District did not review or consider any recent cost information or information or make any cost-of-service comparison between in- and out-of-district ratepayers before adopting 2019 rates of \$96.16 to out-of-district residential ratepayers.

When rates are increased, the entire rate charged must be reviewed, this includes a decision to maintain differentials between customer classes. The District bears the burden of showing that its \$96.16 rate to out-of-district ratepayers is justified and equitable.

### **III. ARGUMENT**

- 1. Ratepayers have the right to challenge the \$96.16 rate implemented rate in January 2019 for out-of-district rates, which charges 74.9% more for out-of-district ratepayers. The petition was timely filed within 90 days of the effective date of the rate change.**

The District argues that this petition was untimely filed. In fact, the petition in this case was filed on March 22, 2019, less than 90 days after the contested rate change occurred. The

Texas Water Code allows ratepayers of a water control and improvement district, such as the District, to appeal a “decision of the governing body of the entity affecting their water, wastewater or sewer rates to the utility commission.” Tex. Water Code §13.043(b). An appeal of a decision made by a water district must be filed within 90 days of a rate change. Tex. Water Code §13.043(c). Included in the new rates imposed beginning January 1, 2019 is a difference charged between in- and out-of-district ratepayers. As part of its appeal of the rate change, Ratepayers specifically request that this difference be evaluated. The Commission acknowledges jurisdiction over this issue and has asked the Judge to determine how costs and revenues compare between in- and out-of-district in order to determine if rates are “sufficient, equitable, and consistent in application to each class of customers.” (PUC Preliminary Order of Referral 3(c)(iv-v)).

However, the District asserts the rate differential cannot be reviewed because it claims that the differential became effective on January 1, 2016. This characterization is misleading. What occurred on January 1, 2016 was a *rate change* similar to the one before the Judge now. See District’s Motion for Summary Decision, pg. DIST000115. In that rate change, the District implemented a 74.9% differential like the one presently at issue. On January 1, 2019 out-of-district ratepayers’ rate changed again from \$92.71 to \$96.16, and in-district ratepayers \$54.05 to \$56.02. Included that rate increase was a decision by the District to re-implement a 74.9% differential in rates charged in- and out-of-district ratepayers. This decision is appealable as it is a decision that affects Ratepayers’ water and sewer rates. Tex. Water Code §13.043.

The District would likely agree that if it chose to alter the rate differential by .01%, that decision would be appealable. The District contends though that its decision to maintain a differential when it implements a rate change is not an appealable decision. What is clear is that

the District made a *decision* about rate differentials for the January 1, 2019 rate change. It decided that for the 2019 year it should charge out-of-district ratepayers 74.9% more for water and wastewater services than in-district ratepayers. Implicit in that decision should be a conclusion by the District that such a differential is necessary based on the cost of services to out-of-district ratepayers. *See* Tex. Water Code §49.215(e).

The decision to maintain this differential affects the Ratepayers' 2019 water and wastewater rates. Specifically, when the District chose to maintain the same differential in its January 1, 2019 rate increase, it raised the out-of-district minimum usage rate by \$3.45, whereas the in-district minimum usage rate only increased by \$1.97. The combination of the 5% increase and the differential is what establishes the Ratepayers' rates that were effective on January 1, 2019. Therefore, both the decision to maintain the differential and the 5% increase are appealable within 90 days of their effective January 1, 2019 date. Ratepayers met this burden. Now, the District bears the burden of showing that its rates are just, reasonable, and not unreasonably preferential or prejudicial. Tex. Water Code §13.043(j). A determination cannot be made regarding the justness or reasonableness of the rates implemented by the District on January 1, 2019 without reviewing whether the underlying evidence of costs and cost-of service support any rate differential and without reviewing whether evidence supports the 5% increase. The District made an unfounded decision, and must now defend it.

**2. Ratepayers have collected signatures of 10% of ratepayers whose rates changed and therefore properly challenged the 5% out-of-district rate increase and 74.9% rate differential implemented in January 2019.**

The Texas Water Code authorizes appeals of rates established by water districts by petition of 10% of ratepayers whose rates have changed. Tex. Water Code 13.043(c). Ratepayers' petition contains signatures of 10% of affected out-of-district ratepayers,

challenging the \$3.45 out-of-district minimum usage rate increase and the impact to other usage charges. This increase includes both a 5% increase in rates and the re-implementation of a 74.9% differential. This fact is not disputed. Ratepayers are not required to challenge the \$1.97 rate increase of in-district ratepayers, as the District's Motion contends. The Water Code does not require that Ratepayers challenge rates charged to a different customer class in order to challenge their own rate increase. In fact, ratepayers are permitted to appeal any decision that affects *their* rates. Tex. Water Code §13.043(b). Further, to require Ratepayers to challenge in-district rates would violate Ratepayers' statutory right to counsel in a contested case, as well as their 5<sup>th</sup> Amendment constitutional due process rights.

**a. Tex. Water Code 13.043(c) does not require Ratepayers to appeal a rate increase of a different customer class.**

Water districts, such as the District, may establish rates by "customer class," defined by the PUC as: "a group of customers with similar cost-of-service with similar characteristics of service that take utility service under a single set of rates." 16 Tex. Admin. Code § 24.3(21). Under the Texas Water Code, ratepayers can appeal decisions by water districts that "affect their water, wastewater, or sewer rates to the utility commission." Tex. Water Code §13.043(b). In order to appeal, ratepayers must collect signatures from 10% of the population that have experienced the rate change. Tex. Water Code 13.043(c). Ratepayers in a customer class have the right to appeal a decision that affects *their* single-set of rates. They need signatures of only 10% of ratepayers in that customer class to do so.

No PUC rule or Texas Water Code statute requires one customer class to challenge the rates imposed on another customer class even if both classes received the same percentage rate increase. To appeal a decision by a water district affecting rates, the Texas Water Code Chapter 13.043 subsection (c) requires a petition with 10% of signatures of "those ratepayers whose rates

have been changed.” Tex. Water Code §13.043(c). Subsection (c) of 13.043 establishes the mechanism ratepayers must utilize to exercise their right to petition as established in subsection (b) of that same statute. The two subsections cannot be divorced from each other and the language of subsection (b) clearly establishes that ratepayers may appeal those decisions that affect the charges made to them:

“Ratepayers ...may appeal the decision of the governing body of the entity affecting **their** water, drainage, or sewage rates...” Tex. Water Code 13.043(b) (emphasis added).

Under Texas law, words in statutes should be given their plain meaning. Tex. Gov. Code 311.011. The word “their” has a common meaning, “of or relating to them or themselves especially as possessors...” Merriam-Webster Dictionary, (11<sup>th</sup> Edition, 2003) available at <https://www.merriam-webster.com/dictionary/their>. “Their” defines a relationship between an entity and people, a place or a thing. Therefore, Tex. Water Code 13.043(b) allows ratepayers to appeal decisions by water districts that affect the single set of rates as assessed to them. To effectuate this as provided by 13.043(c), they must have signatures from at least 10% of all ratepayers who possess the same rate standard.

The District has set rates by customer classes, including in- and out-of-district classes, as well as for retail and residential rates. These different rates are reflected on the District’s “tariff” which contains the rates separated by customer class. 16 Tex. Admin. Code § 24.3(68). The Ratepayers challenge the rate increase of 5% to rates charged to the “out-of-district” customer class. The minimum usage rate for Ratepayers is different from the minimum usage rate for in-district ratepayers because of an imposed 74.9% differential between customer classes. Ratepayers also appeal this differential. The combination of the decisions to increase rates by 5% and maintain a 74.9% differential results in a unique change for Ratepayers. On January 1, 2019



their minimum usage rate increased by \$3.45/month compared with \$1.97/month increase for in-district. The District has established a customer class of out-of-district ratepayers, and that class has challenged the January 1, 2019 \$3.45 change to their minimum usage rates, as well as the 5% increases to all other usage charges.

The District cites the *City of Howardwick* decision as supporting its position. Order No. 4 Dismissing Proceeding, *City of Howardwick Ratepayers' Appeal of the Decision of the Red River Authority of Texas' Decision Affecting Water and Sewer Rates*, Docket No. 46701, (Feb. 17, 2017). The *City of Howardwick* case discusses an appeal of district-wide *retail* rates (a rate charged to the same customer class). The same retail rates were applied district-wide, and the Judge determined that an appeal of those retail rates therefore had to be appealed district-wide. In this case, the customer class is out-of-district ratepayers who received a 5% minimum usage rate increase of \$3.45, a higher rate increase than received by in-district ratepayers.

In opposite, in the *River Place* decision, the Judges allowed a subgroup of affected ratepayers to appeal a rate increase charged by the City of Austin to its entire retail community. SOAH Order No. 6, *Petition of Ratepayers of the Former River Place Water and Wastewater Systems Appealing the Retail Water and Wastewater Rates of the City of Austin*, SOAH Docket No. 473-15-2123.WS (May 6, 2015). Again, the decision involved a customer class of retail customers, and those customers were allowed to appeal a rate increased charged by the City to a larger group of customers because the rate change uniquely affected them. *Id.*

The Texas Water Code grants appellate jurisdiction over a decision made by the District that affects the single-set of rates charged to the out-of-district customer class. All that is required is a petition containing 10% of signatures from households in that customer class.

Ratepayers have met this burden. Therefore, the District's motion for Summary Decision should be denied as a matter of law.

**a. To require Ratepayers to join with in-district ratepayers to appeal the 5% rate increase would violate Ratepayers' right to counsel.**

The District contends that Ratepayers needed to have obtained signatures of 10% of all of the District's ratepayers, which at the time of the petition was 2,371 ratepayers. District's Motion at 4. As there were only 219 out-of-district ratepayers, this would have required Petitioners to seek signatures from in-district ratepayers. Ratepayers' petition challenged the differential in rates that the out-of-district ratepayers believe subsidize the rates paid by customers inside the District's boundaries. Inclusion of signatures from in-district ratepayers would thus create a conflict of interest between signatories. Requiring a pre-hearing procedure that creates such a conflict would violate Ratepayers' right to counsel in an administrative proceeding. Tex. Govt. Code § 2001.053. This right to counsel in contested case hearings extends to rate proceedings before the Commission, including rate appeals. Tex. Water Code §13.003

Ratepayers also have a Fifth Amendment constitutional right to legal representation of their choosing. If they were required to include ratepayers with conflicting interests in their own petition, they would be deprived of this constitutionally-mandated right to counsel. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983).

Under Texas law, statutes should be interpreted liberally to promote justice. Tex. Gov. Code §312.006. There is also a presumption that under an enacted statute the results will be just and reasonable. Tex. Gov. Code §311.021. Any interpretation of Texas Water Code 13.043(c) that would foreclose Ratepayers' right to counsel would be unjust and therefore contrary to Texas canons of statutory construction.

Civil litigants have a right to retain counsel – a right of “constitutional dimensions” that should be “freely exercised without impingement.” *Potaschnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980). This right to counsel in civil litigation extends to administrative proceedings where an adversarial system determines the extent of an individual’s rights. *See Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981)(finding denial of EEOC hearing participant’s right to consult counsel prior to settlement was a due process violation); *see also State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984)(finding that due process of law in an administrative proceeding is evaluated by the “presence or absence of rudimentary fairness”).

Once counsel has been retained, they owe a duty of loyalty to their client. *See Tex. Disciplinary R. of Prof. Conduct*, 1.06 cmt. 1(2019). The U.S. Supreme Court has called this “perhaps the most basic of counsel’s duties.” *Strickland v. Washington*, 466 U.S. 668, 692 (1984). This same principle is embodied in legal practice in Texas through the State Bar’s rules of professional conduct for all attorneys, which prohibit attorneys from representing clients where a conflict of interest exists between them. Texas Disciplinary Rules of Professional Conduct, 1.06(b)(1) (2019). In fact, the Fifth Circuit has recognized a limitation to the right to choose counsel in civil proceedings where that counsel has a conflict of interest. *See McCuin* 714 at 1262.

Here, Ratepayers believe the 2019 out-of-district rate changes directly subsidize the rates of in-district ratepayers. In order to represent the interests of out-of-district ratepayers, their counsel will be advocating for a more equitable differential between in- and out-of-district ratepayers. This could require that for the financial well-being of the District, the rates charged to in-district ratepayers would need to increase. An advocate could not ethically represent the interests of both customer classes under these circumstances. If Ratepayers were required to

partner with in-district ratepayers in order to seek review of the rates charged them, they would effectively be denied their right to retain counsel in violation of Texas statute and the Fifth Amendment because an attempt by an attorney to represent both interests would require their withdrawal from representation. This would leave Petitioners without the guidance of counsel during the adjudication of their right to reasonable and just rates. Therefore, the District's motion for Summary Decision should be denied as a matter of law.

## II. PRAYER

Ratepayers request that the District's Motion for Summary Decision be denied as a matter of law.

Respectfully Submitted

/s/ JENNIFER N. RICHARDS

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**CERTIFICATE OF SERVICE**

I certify that Ratepayers' Proposed Issues for Referral to the State Office of Administrative Hearings will be served on all parties of record on the 20 of September 2019 as required by 16 TAC § 22.74.

By: /s/ Jennifer Richards

Jennifer Richards