

Control Number: 49367



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SOAH DOCKET NO. 473-19-5831.WS  
PUC DOCKET NO. 49367

2019 SEP 20 AM 11:46  
BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

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

**COMMISSION STAFF’S RESPONSE TO SOAH ORDER NO. 6**

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this response. Staff recommends that the Out-of-District Ratepayers’ Motion for Partial Summary Decision and El Paso Water Control and Improvement District No. 4’s Motion for Full or Partial Summary Decision both be denied. In support thereof, Staff would show the following:

**I. BACKGROUND**

On March 22, 2019, Out-of-District Ratepayers (Ratepayers) filed a petition contesting a rate action by El Paso Water Control and Improvement District No. 4 (District). The petition was filed pursuant to 16 Tex. Admin. Code (TAC) § 24.103 and Tex. Water Code (TWC) § 13.043. On June 27, 2019, this matter was referred to the State Office of Administrative Hearings (SOAH).

On September 3, 2019, Ratepayers filed a motion for partial summary decision and request for interim rates. On September 6, 2019, the District filed a motion for full or partial summary decision. On September 9, 2019, the Administrative Law Judge (ALJ) issued SOAH Order No. 6, requiring any responsive pleading to these motions be filed by September 20, 2019. This pleading, therefore, is timely filed.

**II. STAFF’S RESPONSE**

Summary Decision Standard

According to the Commission’s procedural rules, “[t]he presiding officer, on motion by any party, may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially

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noticed . . . or evidence of record show that there is no genuine issue as to any material fact and the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion.”<sup>1</sup> When reviewing a motion for summary judgment, the court must, “take as true all evidence favorable to the nonmovant, and indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.”<sup>2</sup> The nonmovant must produce “more than a scintilla of probative evidence to raise a genuine issue of material fact . . .”<sup>3</sup> More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact’s existence. On the other hand, no more than a scintilla of evidence exists when the evidence offered to prove a vital fact is so weak so as to do no more than create a mere surmise or suspicion of its existence and, in legal effect, is no evidence.<sup>4</sup> The evidence must transcend mere suspicion, and evidence “that is so slight as to make any inference a guess is in legal effect no evidence.”<sup>5</sup>

#### The District’s Motion for Full or Partial Summary Decision

As a preliminary matter, Staff filed a third set of requests for information (RFIs) on September 10, 2019,<sup>6</sup> requesting information pertaining to rate-making formulas, annual reviews of rate-setting, and other information potentially pertinent to this inquiry generally and issues raised in both motions specifically. As such, Staff contends the respective motions of the District and the Ratepayers are premature at this time and should be denied.

The District’s Motion for Full or Partial Summary Decision filed September 6, 2019, raises similar arguments as a previous motion it filed on April 22, 2019, Which the ALJ denied in Order No. 4, filed on May 13, 2019.

In the present motion, the District raises three arguments in favor of summary decision: first, that as the five percent rate increase was for all customers, the petition lacks sufficient signatures; second, that the petition was not timely filed; and, third, even if the petition was

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<sup>1</sup> 16 TAC § 22.182; *see also* Tex. R. Civ. P. 166a(c); 1 TAC § 155.1(f) (adopting PUC procedural rules for matters referred to SOAH).

<sup>2</sup> *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015) (citing *Knott*, 128 S.W.3d 211, 215 (Tex. 2003)).

<sup>3</sup> *Allen ex rel. B.A. v. Albin*, 97 S.W.3d 655, 659 (Tex. App. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004) (citing *Lozano*, 52 S.W.3d at 148; *Browning-Ferris, Inc.*, 865 S.W.2d at 928).

<sup>6</sup> Docket No. 44010 at SOAH Order No. 6 on Jurisdiction, Notice, and Request for Interim Rates at 10 (May 7, 2015).

timely filed, the January 1, 2019 rate change affected all ratepayers and therefore, there are not enough signatures. Staff respectfully disagrees with the District's arguments and will briefly address each, summarizing Staff's previous arguments on these topics, filed May 6, 2019.

First, the District contends that, as the five percent rate increase was for all customers, the petition lacks sufficient signatures. A petition of this nature must be signed by the lesser of 10,000 or ten percent of eligible ratepayers.<sup>7</sup> The District has 2,383 total water ratepayers, of which 247 are classified as out-of-district ratepayers. The District contends that to be sufficient, the petition must have been signed by at least 239 ratepayers. The District cites to a previous Commission decision in Docket No. 46701 to support its contention.<sup>8</sup>

Staff respectfully disagrees: Docket No. 46701 is distinguishable from the present matter and the out-of-district ratepayers need only have 25 signatures for the petition to be sufficient. In Docket No. 46701, the petitioning group of ratepayers was not a unique group. The residents of Howardwick, while geographically distinct, paid the exact same rate as the rest of the utility's ratepayers.<sup>9</sup> As such, the petitioners in that matter were not a unique group and were required to produce at least ten percent of the signatures of the entire body of ratepayers.

In contrast, the out-of-district ratepayers in the present matter are a unique group and have sufficient signatures for the petition. Unlike Docket No. 46701, Docket No. 44010 addressed a situation where one group were being charged a different rate than the other customers of the water utility.<sup>10</sup> Therein, the petitioners were "being charged different rates from other . . . customers" and could petition for review for the unique set of rates they were experiencing. The SOAH ALJ therein determined that the petitioners need only have gathered ten percent of the signatures of the unique group and not the entire body of ratepayers.

Similarly, here, the out-of-district ratepayers pay a unique and higher rate than is charged to the rest of the district. Although the five percent increase is across the board, this different

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<sup>7</sup> TWC § 13.043(c); 16 TAC § 24.103(b).

<sup>8</sup> *City of Howardwick Ratepayers' Appeal of the Decision of the Red River Authority of Texas' Decision Affecting Water and Sewer Rates*, Docket No. 46701, Dismissing Proceeding (Feb 17, 2017)

<sup>9</sup> *Id.* at Ratepayers' Appeal at Bates pg. 2. Staff notes that the water rates detailed are comprised of a base rate and "Demand Block 1" and "Demand Block 2." These blocks are rate differences based on volume of usage – Block 1 for 2,001-7,000 gallons a customer uses, Block 2 for any water used over 7,000 gallons. Otherwise there is no difference between the rates charged to any groups of customers within the Red River Authority.

<sup>10</sup> *Petition of Ratepayers of the River Place Water and Wastewater Systems for Review of a Decision by the City of Austin to Charge Retail Rates*, Docket No. 44010, SOAH Order No. 6 on Jurisdiction, Notice, and Request for Interim Rates at 10 (May 7, 2015).

rate makes them a unique group, much like the petitioners in Docket No. 44010. As such, they are a unique group and the 81 of 247 signatures gathered are more than sufficient to meet the requirements of TWC § 13.043.

Second, the District contends that the petition was not timely filed. On December 15, 2015, the District's Board of Directors voted to adopt a five-year plan for rates. Those rates began January 1, 2016 and change every year thereafter. The District contends that, in order to be timely, the petition must have been filed within 90 days of January 1, 2016.

Staff posits that the petition is timely because the District itself consistently refers to the dates as becoming effective each year and the five-year plan enacted in 2015 included a yearly review. TWC § 13.043(c) states that a petition must be filed "within 90 days of the effective day of the rate change." The District continuously refers to the rate change on January 1, 2019 as the effective date or the date the change went into effect.<sup>11</sup> Further, in responses to RFIs, the District has indicated that its Board reviews the rate plan each year.<sup>12</sup> In its response to Staff first RFIs, the District states, "[t]he Board discussed the District Rate Study conducted by Mr. Dan Jackson from Wildan Financial Services and agree to approve a 5 year plan that is to be reviewed on a yearly basis." As the Board reviews the rates each year and the District itself refers to the rates as becoming effective January 1, 2019, the present petition, filed March 22, 2019, is within the 90-day limit set by TWC § 13.043.

Third, the District contends that even if the effective date is January 1, 2019, the rate change that went into effect affects both in-district and out-of-district ratepayers. As such, the District contends, all of those ratepayers are eligible to appeal and must appeal as one group and the petition must be signed by at least ten percent of its 2,383 customers, not ten percent of the 247 out-of-district ratepayers. Staff contends that SOAH Order No. 6 in Docket No. 44010 remains the guiding decision for the analysis of groups of ratepayers paying different rates.<sup>13</sup> The out-of-district ratepayers pay a different rate than the in-district ratepayers and, as such, are treated as a unique group. To satisfy the ten percent requirement of TWC § 13.043, the

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<sup>11</sup> See Motion for Full or Partial Summary Decision of El Paso County Water Control and Improvement District No. 4 at 2 and 4 (Sep. 6, 2019); see also the District's Response at 4 and Exhibit A at 10 (Apr. 22, 2019).

<sup>12</sup> El Paso County Water Control and Improvement District No. 4's Response to Commission Staff's First Set of Requests for Information at Bates pg. 126.

<sup>13</sup> Docket No. 44010 at SOAH Order No. 6 on Jurisdiction, Notice, and Request for Interim Rates at 10 (May 7, 2015).

petitioners need only have gathered at least 25 signatures of the eligible out-of-district ratepayers. This distinction of the out-of-district ratepayers as a unique group does not preclude other configurations of the District's ratepayers from filing similar petitions: it merely means that the out-of-district ratepayers are a unique group and present petition meets the requirements of TWC § 13.043.

#### Ratepayers' Motion for Partial Summary Decision and Request for Interim Rates

The Ratepayers assert that materials obtained in discovery establish that the District cannot meet its burden to show that the rate differential is just and reasonable. Staff is inclined to agree that, thus far, the District has failed to provide sufficient information to determine if rates are just and reasonable. However, Staff has requested the rate design and formulas utilized by the consultant hired by the District to perform the rate study and rates in question.<sup>14</sup> If the District's answers to those discovery requests provide that information and those formulas, then Staff will be able to form an opinion on the reasonableness of the rates. If those answers are not forthcoming, or that information unavailable, then Staff will be inclined to agree with the Ratepayers on this issue.

As for the request for interim rates, Staff is unopposed to such a request, but offers no further opinion on the matter.

### **III. CONCLUSION**

Staff respectfully requests the both motions for summary decision be denied.

Dated: September 20, 2019

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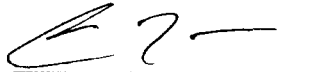
<sup>14</sup> Commission Staff's Third Request for Information to El Paso Water Control and Improvement District No. 4 at 5 (Sep. 10, 2019).

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
LEGAL DIVISION**

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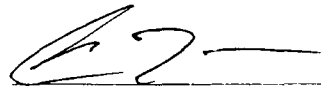


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**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served on all parties of record on this the 20<sup>th</sup> of September 2019 in accordance with the requirements of 16 TAC § 22.74.



Creighton R. McMurray