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**SOAH DOCKET NO. 473-24-03490
PUC DOCKET NO. 55661**

PETITION BY CITIZENS OF LIVINGSTON FOR FAIR AND EQUITABLE RATES, INC. TO REVIEW CITY OF LIVINGSTON'S RATE ORDINANCE NO. A-842	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**CITY OF LIVINGSTON'S MOTION TO DISMISS PETITION
AND MOTION FOR RECONSIDERATION OF SOAH ORDER NO. 1**

The City of Livingston (the City) files this Motion to Dismiss and Motion for Reconsideration of State Office of Administrative Hearings (SOAH) Order No. 1, and in support would show the following:

I. EXECUTIVE SUMMARY

- The Commission does not have jurisdiction over this appeal as PURA does not provide in-city customers of a municipally owned utility the right to appeal a change in rates.¹
- Texas Courts and Commission Staff have previously opined that the Commission lacks jurisdiction of an appeal of a municipally owned utility's rate ordinance brought by ratepayers inside the municipality.
- A rate proceeding subject to appeal pursuant to PURA § 33.052 does not include a proceeding to establish the rates of a municipally owned utility.

II. BACKGROUND

On October 10, 2023, Citizens of Livingston for Fair and Equitable Rates, Inc. (CLFER) filed a petition under Public Utility Regulatory Act (PURA)² § 33.052 appealing the City's Ordinance Amending Article II of Chapter 40 of the City of Livingston Code of Ordinances No. A-842 (Rate Ordinance). On October 18, 2023, the Public Utility Commission of Texas (Commission) referred this docket to SOAH,³ and on October 20, 2023, the SOAH administrative law judge (ALJ) issued SOAH Order No. 1, finding that the Commission has

¹ The City notes that the Commission issued a draft preliminary order on October 26, 2023, and included the issue of whether the Commission has jurisdiction over this appeal as the first issue in the draft preliminary order. The Commission will consider the draft preliminary order at the November 2, 2023, Open Meeting.

² Public Utility Regulatory Act, Tex. Util. Code §§ 11.001–66.016 (PURA).

³ Order of Referral (Oct. 18, 2023).

jurisdiction and authority over this matter pursuant to PURA §§ 33.052 and 33.054.⁴ However, PURA does not provide for an appeal by residents of a city from charges established by that city's municipally owned utility. Therefore, the City timely files this Motion to Dismiss CLFER's Petition and Motion for Reconsideration of SOAH Order No. 1 because the Commission lacks jurisdiction in this proceeding.⁵

III. MOTION TO DISMISS

The City moves for immediate dismissal of CLFER's Petition with prejudice based on the Commission's lack of jurisdiction over the Petition.⁶ No provision of PURA authorizes the citizens of a municipality to appeal to the Commission rates established by a municipally owned utility. CLFER filed its Petition with the Commission pursuant to PURA § 33.052, which allows the residents of a municipality to appeal to the Commission the decision of the municipality's governing body in a *rate proceeding*.⁷ However, it has been determined that the term "rate proceeding," as contemplated in PURA § 33.052, does not include a proceeding to establish the rates of a municipally owned utility.⁸ PURA § 33.052 is therefore inapplicable to CLFER's Petition. Because the Commission lacks jurisdiction over the proceeding under PURA § 33.052 and any other provision in PURA Subchapters C, D, and E, the Commission should dismiss the Petition with prejudice.

A. Texas Courts and Commission Staff Have Determined that Ratepayers Within City Limits Do Not Have the Right of Appeal to the Commission Concerning Municipal Action Related to the Rates of a Municipally Owned Utility

Texas courts and Commission Staff have both concluded that PURA Subchapters C, D, and E do not grant the Commission jurisdiction over the appeal of a municipally owned utility's rate ordinance brought by ratepayers inside the municipality.

⁴ SOAH Order No. 1 Project Description; Jurisdiction; Deadline for Decision; Mediation Statement Required; Setting Prehearing Conference; and General Procedures at 2 (Oct. 20, 2023).

⁵ Pursuant to 16 Texas Administrative Code § 22.123(b)(2) (TAC), a motion for reconsideration of an interim order shall be filed within five working days of the issuance of the written interim order. SOAH Order No. 1 was issued on October 20, 2023. Five working days from October 20, 2023, is October 27, 2023. Therefore, this Motion for Reconsideration of SOAH Order No. 1 is timely filed.

⁶ 16 TAC § 22.181(c), (d)(1).

⁷ PURA § 33.052 (emphasis added).

⁸ Tex. Att'y Gen. Op., No. H-812 (Apr. 20, 1976).

In the last petition of a municipally owned utility's rate ordinance brought by ratepayers outside the municipality at the Commission, which was more than ten years ago, Commission Staff opined that "in-City customers cannot appeal to the Commission."⁹ In a discussion about whether to directly assign rate case expenses to customers living outside of the municipal limits (environs customers) in an appeal of the City of Austin's rate ordinance brought by environs customers, Commission Staff stated that "[c]harging appellate costs to the environs customers is also consistent with the intent of PURA as expressed in *P.U.C. of Texas v. City of Austin*. The Court of Appeals stated:

The city council members who enact an ordinance fixing utility rates within and without the municipal limits will be responsible to the *city residents* who elected them. Hence, the ballot box is available to *citizens of the municipality* who are aggrieved by the ordinance. Lacking a provision such as PURA § 26(c), no corresponding recourse would be available to nonresident ratepayers of a municipally-owned electric utility.¹⁰

Commission Staff continued to state that "[t]he court made clear that '[r]atepayers within the city limits do not have the right of appeal to the Commission concerning municipal action related to the rates of a municipally-owned water, sewer, electric or gas utility.'"¹¹ Commission Staff's interpretation of PURA Subchapters C, D, and E, would help explain why appeals by residential in-city customers of a municipally owned utility have no history of being a part of the Commission's docket.

The Court of Appeals case cited by Commission Staff in Docket No. 40627 provides dispositive language on the issue:

Taken as a whole, PURA also represents an attempt to retain local regulation of public utilities while empowering the Commission to regulate regional service or service outside municipal limits. Towards that end, municipalities under PURA § 17(a) retain exclusive jurisdiction over the rates, operations, and services of electric, water, and sewer "utilities" within their city or town limits. In areas outside municipal limits, the Commission has exclusive original jurisdiction over these functions. PURA § 17(e). This duality in regulation is also evident in the appellate scheme. Ratepayers within the city limits do not have the right of appeal to the Commission concerning municipal action related to the rates of a

⁹ *Petition by Homeowners United for Rate Fairness to Review Austin Rate Ordinance No. 20120607-055*, Docket No. 40627, Staff's Statement of Position at 4–5 (Feb. 15, 2013).

¹⁰ *Id.*, citing *Public Utility Commission of Texas v. City of Austin*, 728 S.W.2d 907, 913 (Tex. App.—Austin 1987, writ ref'd n.r.c.).

¹¹ *Id.*

municipally-owned water, sewer, electric or gas utility. In contrast, ratepayers outside the city are expressly granted the right to appeal municipally-owned gas or electric utility rates by filing a petition with the Commission. PURA § 26(c).¹²

The Court of Appeals further found, consistent with the City's positions stated above in this Motion, "[t]he Legislature has given municipalities the authority to set electric rates free from regulation by the Commission in all but three instances: (1) following appeal of the rates of a municipally-owned utility by ratepayers outside the city limits; (2) upon the expansion of a city's retail utility system to an area served by another retail public utility, and (3) in certain reporting and recordkeeping requirements."¹³

B. "Rate Proceeding" Does Not Include a Proceeding to Set Municipally Owned Utility Rates

PURA expressly provides who has a right to appeal a municipally owned utility's rate ordinance, and it does not provide an appeal right for in-city residential ratepayers to challenge that a rate established by a municipally owned utility is unjust or unreasonable.¹⁴ Under the procedures established in PURA § 33.052, the residents of a municipality may appeal to the Commission the decision of the municipality's governing body in a *rate proceeding* by filing with the Commission a petition for review signed by a number of qualified voters of the municipality equal to at least the lesser of 20,000 or 10 percent of the qualified voters of the municipality.¹⁵ The appellate procedure established in PURA § 33.052 applies to *rate proceedings*. PURA § 11.003(16) defines "rate" as being charged by a "public utility." Under PURA § 11.004, "public utility" means an electric utility as that term is defined by Section 31.002, or a public utility or utility as those terms are defined by Section 51.002. Therefore, the term "public utility" does not include a municipally owned utility. Because a municipally owned

¹² *Public Utility Commission of Texas v. City of Austin*, 728 S.W.2d 907, 913 (Tex. App.—Austin 1987, writ ref'd n.r.e.); see also, *Tara Partners, Ltd. v. City of S. Houston*, 282 S.W.3d 564, 573 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) "This limitation is consistent with the legislative history of public utility regulation in Texas, which 'represents an attempt to retain local regulation of public utilities while empowering the Commission to regulate regional service or service outside municipal limits.'" citing *Pub. Util. Comm'n v. City of Austin*, 728 S.W.2d 907, 913 (Tex. App.—Austin 1987, writ ref'd n.r.e.); see also *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 683 (Tex. 1983) (describing municipalities' opposition to state regulation of municipally owned utilities and explaining statutory compromise of retaining municipal regulation within a municipality's territorial boundaries and exempting municipalities from most of the statute's regulatory provisions).

¹³ *Id.*, citing Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 26(c), 49(a) & 50(2), 27 (Supp.1986); Pleitz & Little, *Municipalities and the Public Utility Regulatory Act*, 28 Baylor L. Rev. 977, 980–81 (1976).

¹⁴ See PURA Ch. 33 at Subch. C, D & E.

¹⁵ PURA § 33.052 (emphasis added).

utility is not a “public utility,” the term “rate proceeding” as contemplated in PURA § 33.052 does not include a proceeding or ordinance to establish rates of municipally owned utilities.¹⁶ Therefore, PURA Subchapter C instead governs who may appeal an investor-owned utility’s municipal rates and when—(1) a party to a rate proceeding within 30 days after the municipality’s order;¹⁷ and (2) a group of at least 20,000 or 10 percent of the qualified voters of the municipality within 30 days after the municipality’s order.¹⁸ These provisions are not applicable to ratepayers of municipally owned utilities.

This conclusion is further confirmed by the explicit intent of Subtitle B of PURA, which includes PURA § 33.052. PURA § 31.001 specifically states that the purpose of Subtitle B is “to protect the public interest inherent in rates and services of *electric utilities*.”¹⁹ Under Subtitle B of PURA, “electric utility” is defined as not including a municipal corporation.²⁰ Lastly, PURA makes it clear that Subtitle B does not authorize the Commission to “regulate or supervise the rate or service of a municipally owned utility[.]”²¹

C. PURA Only Provides Two Methods to Appeal Municipally Owned Rates—Neither Apply Here

Instead, PURA contains detailed and comprehensive provisions outlining only *two* methods by which an appeal of a municipally owned utility’s rate ordinance can be considered by the Commission. The first—a group of at least 10,000 or 5 percent of the total ratepayers *outside* the municipality may appeal within 45 days after the municipality issues a written report stating the effect of the decision on each class of ratepayers.²² Under PURA § 33.101, the ratepayers of a municipally owned utility who are outside the municipality may appeal to the Commission *an action of the governing body of the municipality affecting the municipally owned utility’s rates* by filing with the Commission a petition for review signed by a number of ratepayers served by the utility outside the municipality equal to at least the lesser of 10,000 or

¹⁶ Tex. Att’y Gen. Op., No. H-812 (Apr. 20, 1976).

¹⁷ PURA §§ 33.051, 33.053.

¹⁸ PURA §§ 33.052, 33.053.

¹⁹ PURA § 31.001(a) (emphasis added).

²⁰ PURA § 32.002(6)(A).

²¹ PURA § 32.002(1).

²² PURA §§ 33.101, 33.103.

five percent of those ratepayers.²³ It is clear that this provision applies to appeals by persons who live outside a city but who are served by that city's municipally owned utility, which is not the case here.

The second authorized rate appeal of a municipally owned utility's rates is contained in Subchapter E, "Rate Determination and Appeal of Orders of Certain Municipal Utilities."²⁴ It outlines a very narrow process by which in-city customers of a municipally owned utility may be able to appeal rates of a municipally owned electric utility. As a prerequisite to the Commission's jurisdiction under Subchapter E, the municipally owned utility's rates must first have been appealed by ratepayers who are outside the municipality, pursuant to Subchapter D.²⁵ Once the conditions in PURA § 33.121(1)–(3) are satisfied, the Commission has appellate jurisdiction over the rates charged by the municipally owned utility, both inside and outside the municipality, subject to certain exceptions.²⁶ Under PURA § 33.122(e), the Commission's jurisdiction under this section may be invoked by any party to a local rate proceeding required by this section *in the same manner as an appeal of the rates of an electric utility under Section 33.051*. This language confirms that PURA Subchapter C, including PURA §§ 33.051 and 33.052, is limited to an appeal of an investor-owned electric utility's municipal rates. If PURA § 33.052 conferred upon in-city customers the right to appeal a municipally owned utility's rates, it would render PURA Subchapter E meaningless. It is a commonly held canon of statutory interpretation that when construing statutory text, we avoid constructions that would render provisions meaningless.²⁷

Because PURA expressly outlines a detailed process for ratepayers outside of a city's boundaries to appeal the municipally owned utility's rates to the Commission, the Legislature did not intend to provide that same appeal right to ratepayers inside the city. Instead, the Legislature excluded from PURA's appeal provisions resident ratepayers who can address municipal rate decisions through the election process and made it clear that resident ratepayers may not appeal a municipality's rate decisions to the Commission. Therefore, "under the present wording of the statute, ratepayers outside the municipality can appeal a decision in a proceeding to fix rates of

²³ PURA § 33.101 (emphasis added). Notably absent in this provision is the term "rate proceeding."

²⁴ PURA §§ 33.121–33.123.

²⁵ PURA §§ 33.121.

²⁶ PURA §§ 33.122(a).

²⁷ *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000).

municipally owned utilities, but a resident of the municipality may not. If a different result was intended, it must await further legislative clarification.”²⁸

IV. MOTION FOR RECONSIDERATION OF SOAH ORDER NO. 1

On October 20, 2023, the SOAH ALJ issued SOAH Order No. 1, finding, among other things, that the Commission has jurisdiction and authority over this matter pursuant to PURA §§ 33.052 and 33.054.²⁹ The City moves for reconsideration of SOAH Order No. 1 because this finding of jurisdiction where jurisdiction does not exist is unjustified, improper, and immediately prejudices a substantial or material right of the City in this proceeding, pursuant to 16 Texas Administrative Code (TAC) § 22.123(b)(1),(3). As explained above, there is no provision in PURA that authorizes the citizens of a municipality to appeal to the Commission rates established by a municipally owned utility. Therefore, the Commission lacks jurisdiction over the appeal of a municipally owned utility’s rate ordinance brought by ratepayers inside the municipality.

The SOAH ALJ also found in SOAH Order No. 1 that PURA § 33.054(c) provides that the Commission must enter a final order on or before the 185th day after appeal is perfected or the utility files a rate application as prescribed by PURA § 33.104.³⁰ As described above, PURA § 33.104 is under Subchapter D, which is titled, “Provisions Applicable to Appeal by Ratepayers outside Municipality.” Therefore, this requirement is not applicable to an appeal brought by ratepayers inside the municipality, as is the case here.

V. CONCLUSION

The City respectfully requests that SOAH grant the City’s Motion to Dismiss, dismiss CLFER’s Petition with prejudice, and reverse its finding of Commission jurisdiction in SOAH Order No. 1. Additionally, the City requests any further relief to which it has shown itself justly entitled.

²⁸ Tex. Att’y Gen. Op., No. H-812 at 8 (Apr. 20, 1976).

²⁹ SOAH Order No. 1 - Project Description; Jurisdiction; Deadline for Decision; Mediation Statement Required; Setting Prehearing Conference; and General Procedures at 2 (Oct. 20, 2023).

³⁰ *Id.*

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**ATTORNEYS FOR THE CITY OF
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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on October 27, 2023, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Rashmin J. Asher

Rashmin J. Asher